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UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

LUIS MIRELES, et al.,

Plaintiffs,

vs.

WELLS FARGO BANK, N.A., a national  
banking association; WELLS FARGO  
HOME MORTGAGE, a national banking  
association; AMERICA'S SERVICING  
COMPANY, a national banking  
association; WACHOVIA MORTGAGE,  
FSB, a national banking association;  
WACHOVIA BANK, FSB, f/k/a WORLD  
SAVINGS BANK, FSB-TX, a national  
banking association; GOLDEN WEST  
FINANCIAL CORPORATION, a  
Delaware corporation; WORLD SAVINGS  
BANK, FSB, a national banking  
association; WORLD SAVINGS, INC., a  
California corporation; CAL-WESTERN  
RECONVEYANCE CORPORATION, a  
California corporation; and DOES 1  
through 1000, inclusive,,

Defendants.

CASE NO. CV 11-07720 MMM (FMOx)

ORDER GRANTING PLAINTIFFS'  
MOTION TO REMAND; DENYING  
DEFENDANTS' MOTION TO DISMISS  
AS MOOT

On August 16, 2011, plaintiffs filed this action in Los Angeles Superior Court.<sup>1</sup>  
Defendants removed the case to this court on September 16, 2011, asserting that the action was

<sup>1</sup>Notice of Removal ("Removal"), Docket No. 1 (Sept. 16, 2011), Exh. A ("Complaint").

a “mass tort” action and invoking jurisdiction under the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d).<sup>2</sup> Defendants also invoked the court’s diversity jurisdiction under 28 U.S.C. § 1332(a).<sup>3</sup> On October 14, 2011, plaintiffs filed a motion to remand.<sup>4</sup> Defendants filed a motion to dismiss one week later, on October 21, 2011.<sup>5</sup> Both motions are opposed.<sup>6</sup>

## I. FACTUAL BACKGROUND

### A. The Complaint’s Factual Allegations

The complaint in this action was filed on behalf of 108 named plaintiffs. It is a sprawling document that is 84 pages and 387 numbered paragraphs long; many paragraphs contain multiple subparagraphs. The court summarizes the complaint’s allegations below.

The complaint alleges that “[a]s the result of an aggressive and relentlessly pursued growth strategy between 2003 and 2009,” Wells Fargo Bank, N.A. (“Wells Fargo”) became the fourth largest banking institution in the nation, and was the “master servicer” for loans and mortgages at issue in this action.<sup>7</sup> As part of a massive scheme of investor fraud, defendants allegedly inflated property appraisals, disregarded underwriting standards, sold predatory loan products, and promised refinancing packages, all while asserting that they were “prudently lending to

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<sup>2</sup>Removal, ¶ 16.

<sup>3</sup>*Id.*, ¶ 28.

<sup>4</sup>Motion to Remand (“Remand Motion”), Docket No. 13 (Oct. 14, 2011).

<sup>5</sup>Motion to Dismiss Complaint (“MTD”), Docket No. 21 (Oct. 21, 2011). Cal-Western Reconveyance Corporation joined the motion to dismiss. (Motion for Joinder in Motion to Dismiss Complaint, Docket No. 25 (Oct. 24, 2011).)

<sup>6</sup>Opposition to Motion to Remand Case (“Remand Opp.”), Docket No. 28 (Dec. 5, 2011); Opposition to Motion to Dismiss Complaint (“MTD Opp.”), Docket No. 30 (Dec. 5, 2011); Reply in Support of Motion to Remand Case (“Remand Reply”), Docket No. 33 (Dec. 12, 2011); Reply in Support of Motion to Dismiss Complaint (“MTD Reply”), Docket No. 32 (Dec. 12, 2011).

<sup>7</sup>Complaint, ¶ 3.

qualified homeowners.”<sup>8</sup> Defendants allegedly sold mortgage products to borrowers who could not otherwise meet traditional underwriting standards for such loans, and thereby contributed to a massive housing price bubble.<sup>9</sup> After the bubble collapsed, plaintiffs’ net worth and credit ratings were devastated.<sup>10</sup> The complaint alleges that defendants are responsible for a host of other ills related to the current economic crisis, including a “mortgage meltdown in California that was substantially worse than any economic problems facing the rest of the United States,”<sup>11</sup> and a “knowing[ ] and systematic[ ] destr[uction of] California home values.” They assert that defendants “acted with callous or reckless disregard” for the fact that “their actions [might] cause California home prices to plummet.”<sup>12</sup>

Defendants allegedly created risky “mortgage pools,” promising investors lucrative benefits, and “managed risk through leverage and derivatives trading.”<sup>13</sup> They purportedly knew that the mortgage pools contained loans that were at very high risk of default.<sup>14</sup> Borrowers like plaintiffs were allegedly “handcuffed” and required to accept these “dangerous products” because defendants imposed substantial early payment penalties if borrowers “tried to get out of the[ ] toxic loans [and replace them with] more stable fixed rate products.”<sup>15</sup>

With the proceeds of TARP funds, defendants allegedly committed numerous fraudulent acts, including issuing notices of default in violation of California law, misrepresenting their

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<sup>8</sup>Complaint, ¶ 9.

<sup>9</sup>*Id.*, ¶ 10.

<sup>10</sup>*Id.*

<sup>11</sup>*Id.*, ¶ 15.

<sup>12</sup>*Id.*, ¶ 16.

<sup>13</sup>*Id.*, ¶¶ 18-21.

<sup>14</sup>*Id.*, ¶ 22.

<sup>15</sup>*Id.* The complaint pleads specific examples of this purportedly experienced by the named plaintiffs, who attempted to secure loan modifications or have defendants honor certain provisions of their loan contracts without success. (*Id.*, ¶¶ 38-41.)

1 intention to arrange loan modifications for plaintiffs, and failing to respond to plaintiffs'  
 2 communications.<sup>16</sup> Plaintiffs assert that defendants have been foreclosing on their homes without  
 3 proof that defendants hold the notes and deeds of trust they seek to enforce, and without being able  
 4 to demonstrate ownership of notes and trust deeds in question.<sup>17</sup>

5 The complaint also contains a number of allegations regarding Wachovia, and its  
 6 acquisition of Golden West Financing Corporation ("Golden West"). Golden West was an  
 7 Oakland, California-based mortgage lender run by Herbert and Marion Sandler.<sup>18</sup> It offered a  
 8 product known as the "Pick-A-Pay" mortgage.<sup>19</sup> This type of mortgage permitted borrowers to  
 9 choose from multiple payment options every month: (1) full payment of interest and principal  
 10 sufficient to pay down the loan over a traditional 30 year term; (2) a higher payment that would  
 11 pay off the loan in 15 years; (3) an interest-only payment; or (4) a minimum payment that did not  
 12 cover interest, and caused the unpaid interest to be added to the loan balance.<sup>20</sup> Plaintiffs contend  
 13 that the fourth option resulted in "negative amortization," i.e., in growth of the outstanding  
 14 balance over time.<sup>21</sup> Plaintiffs contend that this product lured borrowers to take out loans by  
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 17 <sup>16</sup>*Id.*, ¶ 26.

18 <sup>17</sup>*Id.*, ¶ 27. The complaint contains a number of allegations regarding "MERS," which is  
 19 Mortgage Electronic Registration Systems. Plaintiffs allege that MERS operates as a registry to  
 20 track servicing rights and the ownership of mortgages. Although it contends that it is the owner  
 21 of the security interests associated with the mortgages, plaintiffs allege that defendants use the  
 22 company to facilitate the unlawful transfer of mortgages. (*Id.*, ¶¶ 30-34.) They contend that  
 23 MERS's "status" was suspended in California on May 31, 2002. (*Id.*, ¶ 36.) They also allege  
 24 that MERS has entered into a consent decree with various federal agencies to correct its allegedly  
 25 "unsafe or unsound practices." (*Id.*, ¶ 37; see also *id.*, ¶¶ 231-36 (describing the MERS consent  
 26 decree in greater detail).) The complaint pleads further details regarding MERS's participation  
 27 in allegedly fraudulent mortgage transfers in later paragraphs. (*Id.*, ¶¶ 252-66.)

28 <sup>18</sup>*Id.*, ¶ 179.

<sup>19</sup>*Id.*, ¶¶ 178-79.

<sup>20</sup>*Id.*, ¶ 179.

<sup>21</sup>*Id.*, ¶ 180.

1 offering low “teaser” rates that “ratcheted sharply upwards as interest rates increased.”<sup>22</sup> It was  
 2 purportedly marketed to unsophisticated home buyers who did not understand the financial risks  
 3 they faced if they entered into such a loan.<sup>23</sup> Plaintiffs assert that Golden West’s loans were  
 4 labeled the “Typhoid Mary of the mortgage industry” by *The New York Times*, and that the  
 5 Slanders were included on a list of “25 people to blame for the financial crisis” by *Time*  
 6 *Magazine*.<sup>24</sup> After Wachovia acquired Golden West, its mortgage portfolio was dominated by  
 7 Pick-A-Pay mortgages. By the end of 2007, it held \$120 billion of these mortgages, compared  
 8 with \$50 billion of “traditional mortgages.”<sup>25</sup> More than \$70 billion of Wachovia’s Pick-A-Pay  
 9 mortgages were issued to California borrowers.<sup>26</sup>

10 When Wachovia announced its purchase of Golden West, the housing market was already  
 11 beginning to decline, and investors were concerned about their potential exposure.<sup>27</sup> To reassure  
 12 its investors, Wachovia’s officers made various representations regarding the safety and stability  
 13 of Golden West’s portfolio, and claimed to have implemented policies to ensure that borrowers  
 14 could pay their loan obligations.<sup>28</sup> Wachovia stated in 2007 that it did not “anticipate any  
 15 meaningful potential impact to earnings with the sub prime going forward.”<sup>29</sup>

16 The Pick-A-Pay loans were allegedly concentrated in California, and when these loans  
 17 “reset prematurely due to the contractual breaches by Wells Fargo,” many homeowners lost their  
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19 <sup>22</sup>*Id.*, ¶ 181.

20 <sup>23</sup>*Id.*

21 <sup>24</sup>*Id.* *USA Today* allegedly described the Slanders as “ruthless home lenders who helped  
 22 destroy Wachovia Corp.” (*Id.*)

23 <sup>25</sup>*Id.*, ¶ 182.

24 <sup>26</sup>*Id.*, ¶ 191.

25 <sup>27</sup>*Id.*, ¶ 183-84.

26 <sup>28</sup>*Id.*, ¶ 186.

27 <sup>29</sup>*Id.*

homes through foreclosure.<sup>30</sup> Plaintiffs allege that defendants were motivated to foreclose on properties quickly so that the homes could be added to their growing inventory of Real Estate Owned (“REO”) properties.<sup>31</sup> When Wells Fargo acquired Wachovia, it allegedly took a large ‘paper loss’ on Wachovia’s nonperforming loans and mortgages, so that whatever money or benefits it was able to recoup on the defaulted mortgages could be reflected as new profits.<sup>32</sup>

Plaintiffs contend that, according to data reported pursuant to the Home Mortgage Disclosure Act, fully one-fifth of all the loans defendants made to low and moderate income borrowers, including plaintiffs, were high-cost refinance loans with an average interest rate of 9.8%; these loans purportedly represented close to \$11 billion in lending. Plaintiffs assert that the loans went directly into mortgage pools securitized and sold by defendants, who profited from the loans’ “secret excessive markups.”<sup>33</sup>

The complaint alleges that had all of this information been properly disclosed to plaintiffs, they would have behaved differently, deferring their purchase of a home and refusing to enter into expensive adjustable rate mortgages.<sup>34</sup> It pleads a multitude of purportedly deceptive acts by

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<sup>30</sup>*Id.*, ¶ 188.

<sup>31</sup>*Id.*, ¶ 188. The complaint alleges:  
 “Defendants now seek to capitalize on these losses which Defendants themselves created. For example, utilizing their rights of first right of refusal at trustee sales, Defendants have purchased the properties on which they foreclosed and retain these distressed properties at a discount to the detriment of the homeowner. These properties are being leased out to the public and are being held for sale in the Defendants’ REO portfolio by their affiliate, Premiere Asset Services, awaiting the market rebound. Defendants can then avoid flooding the market with cheap fire-sale real estate and further devastate their own market values that they now wish to recoup, in contrast to the time frame when Defendants caused these declines in value.” (*Id.*, ¶ 189.)

<sup>32</sup>*Id.*, ¶ 190.

<sup>33</sup>*Id.*, ¶ 193. The complaint states that the enforcement director of the SEC characterized the loans as “secret” and “excessive.” (*Id.*)

<sup>34</sup>*Id.*, ¶¶ 196-99.

1 defendants, including their failure to:

2 “(1) establish due diligence policies, procedures and controls reasonably designed  
3 to detect and report instances of money laundering, (2) establish procedures to take  
4 reasonable and practicable measures to verify the identity of those applying for an  
5 account with the institution and maintain records of the information used to verify  
6 a person’s identity, including name, address, and other identifying information,  
7 (3) determine and report the sources of funds used for the mortgages they  
8 originate[d] and service[d], as well as the sources of funds used to acquire any  
9 mortgages, [and] (4) disclose to Plaintiffs the identities, address and telephone  
10 numbers of transferees of their mortgages.”<sup>35</sup>

11 Essentially, the complaint asserts that defendants engaged in a fraudulent scheme by offering  
12 mortgages at unsustainable loan-to-value ratios, often to individuals who they knew were a poor  
13 credit risk and at high risk of default.<sup>36</sup> Defendants were allegedly aware of the consequences of  
14 their actions, and knew that defaults on a large scale would have a cascade effect and depress  
15 property values throughout the state, causing plaintiffs and other similarly situated individuals to  
16 lose the equity in their homes and have no means to refinance their mortgage or sell their home.<sup>37</sup>

17 Plaintiffs charge that defendants fraudulently misrepresented to multiple plaintiffs that they  
18 would receive assistance securing a loan modification.<sup>38</sup> They also implied or stated that if  
19 plaintiffs sought a loan modification, defendants would assist them and they would often be able  
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21 <sup>35</sup>*Id.*, ¶ 200.

22 <sup>36</sup>*Id.*, ¶¶ 209-10.

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24 <sup>37</sup>*Id.*, ¶ 211. Although the complaint contains allegations that sound in fraud, the precise  
25 thrust of the claims is unclear. The complaint alleges that certain plaintiffs were fraudulently  
26 induced to enter into mortgages they could not afford, and that defendants engaged in a broader  
27 scheme to deceive their investors and the public at large about the lax nature of their underwriting  
and business practices. At different times the complaint appears to base its fraud allegations on  
both theories of liability.

28 <sup>38</sup>*Id.*, ¶ 212.

1 to obtain a modification. Defendants purportedly made these representations with no intention of  
 2 providing assistance to plaintiffs, or with knowledge that plaintiffs were not good candidates for  
 3 loan modifications.<sup>39</sup>

4 Plaintiffs also allege that defendants sold the notes and deeds of trust relating to plaintiffs'  
 5 properties in transactions that were unlawful or fraudulent in various ways. The sales allegedly

6 “(a) [i]ncluded sales to nominees who were not authorized under law at the time to  
 7 own a mortgage, including, among others, MERS;

8 (b) [i]nvolved misrepresentations by Defendants to investors and concealment from  
 9 investors of Plaintiff[s’] true financial condition and the true value of Plaintiff[s’]  
 10 home[s] and mortgage[s];

11 (c) [i]nvolved misrepresentations by Defendants to investors and concealment from  
 12 investors of the true financial condition of other borrowers and the true value of  
 13 their homes and mortgages also included in the pools;

14 (d) [w]ere for consideration greater than the actual value of the said notes and deeds  
 15 of trust;

16 (e) [w]ere for consideration greater than the income stream that could be generated  
 17 from the instruments even assuming a 0% default rate thereon. . . .”<sup>40</sup>

18 Plaintiffs assert that, had they been aware of defendants’ conduct, they would not have entered  
 19 into their mortgages or purchased homes.<sup>41</sup>

20 Plaintiffs allege that Wells Fargo is now under investigation by various governmental  
 21 agencies, and is being sued in several class actions.<sup>42</sup> They contend that Wells Fargo settled a  
 22 lawsuit with the California Attorney General that alleged lending violations related to the Pick-A-

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24 <sup>39</sup>*Id.*, ¶ 212.

25 <sup>40</sup>*Id.*, ¶ 218.

26 <sup>41</sup>*Id.*, ¶¶ 221-28.

27 <sup>42</sup>*Id.*, ¶ 229.



1 Pay loan product; the settlement purportedly contemplates that the bank will make \$2 billion in  
 2 loan modifications.<sup>43</sup> Wells Fargo has also allegedly entered into settlements with the attorneys  
 3 general of Arizona, Colorado, Florida, Illinois, Nevada, New Jersey, Texas, and Washington.<sup>44</sup>  
 4 The company purportedly agreed to make \$600 million in loan modifications, and to fund a \$50  
 5 million settlement fund in order to resolve a lawsuit against Wachovia's mortgage unit.<sup>45</sup> Finally,  
 6 on April 5, 2011, Wells Fargo and the SEC purportedly settled charges related to  
 7 "misrepresentations to investors associated with selling mortgage backed securities."<sup>46</sup>

8 The complaint describes in detail a consent decree into which Wells Fargo entered with the  
 9 Office of the Comptroller of the Currency ("OCC Order"). The decree purportedly states that  
 10 various federal agencies, including the Board of Governors of the Federal Reserve System, the  
 11 FDIC, and the Office of Thrift Supervision, found that Wells Fargo had engaged in "unsafe or  
 12 unsound practices" in its handling of foreclosure-related activities.<sup>47</sup> The OCC Order allegedly  
 13 states that Wells Fargo

14 "filed or caused to be filed in state and federal courts numerous affidavits executed  
 15 by its employees or employees of third-party service providers making various  
 16 assertions, such as ownership of the mortgage note and mortgage, the amount of the  
 17 principal and interest due, and the fees and expenses chargeable to the borrower,  
 18 in which the affiant represented that the assertions in the affidavit were made based  
 19 on personal knowledge or based on a review by the affiant of the relevant books  
 20 and records, when, in many cases, they were not based on such personal knowledge  
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23 <sup>43</sup>*Id.*, ¶ 230.

24 <sup>44</sup>*Id.*

25 <sup>45</sup>*Id.*, ¶ 231.

26 <sup>46</sup>*Id.*, ¶ 232.

27 <sup>47</sup>*Id.*, ¶ 237.

1 or review of the relevant books and records. . . .”<sup>48</sup>

2 Plaintiffs allege that under the OCC Order, Wells Fargo was required to submit to audits and  
3 execute a comprehensive plan to “reimburse homeowners who had been improperly foreclosed  
4 upon.”<sup>49</sup> The OCC Order purportedly concluded that Wells Fargo had litigated foreclosure  
5 proceedings and initiated non-judicial foreclosure sales without properly endorsed or assigned  
6 documents in violation of law.<sup>50</sup> Plaintiffs assert that governmental investigations are ongoing;  
7 they quote from a news article stating that the Department of Housing and Urban Development’s  
8 inspector general is conducting a confidential audit of the company.<sup>51</sup>

9 The complaint pleads six state law claims. The first four, asserted by all plaintiffs, allege  
10 (1) fraudulent concealment; (2) intentional misrepresentation; (3) negligent misrepresentation; and  
11 (4) violation of the Unfair Competition Law (“UCL”), California Business & Professions Code  
12 § 17200 et seq.<sup>52</sup> The complaint also pleads a wrongful foreclosure claim on behalf of eleven  
13 plaintiffs who lost their properties to foreclosure, and a breach of contract claim on behalf of nine  
14 plaintiffs who signed Pick-A-Pay mortgage loan agreements with defendants.<sup>53</sup>

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16 <sup>48</sup>*Id.*

17 <sup>49</sup>*Id.*, ¶ 238-39.

18 <sup>50</sup>*Id.*, ¶ 244

19 <sup>51</sup>*Id.*, ¶ 247.

20 <sup>52</sup>This cause of action alleges a number of violations of the UCL’s “unlawful” prong,  
21 including violations of federal securities laws, California Civil Code provisions governing the non-  
22 judicial foreclosure process, the U.S.A. PATRIOT Act, assorted state and federal fair debt  
23 collection statutes, and the Truth in Lending Act. (Complaint, ¶¶ 338-62.)

24 <sup>53</sup>*Id.*, ¶¶ 290-387. The complaint also alleges that defendants violated the Truth in Lending  
25 Act, 15 U.S.C. 1640 et seq., and the USA Patriot Act, 31 § U.S.C. § 5318, et seq., but does not  
26 allege causes of action arising under those laws. Instead, violations of those laws (in addition to  
27 other federal laws) are alleged to satisfy the “unlawful” conduct prong of the California UCL.  
(*Id.*, ¶¶ 346, 350-51.)

28 The subsets of plaintiffs bringing the fifth and sixth causes of action do not overlap with  
one another, with the exception of plaintiff Cristina Magana. (*Id.* at 77, 81.)

**B. The Complaint's Allegations Regarding Citizenship of the Parties and Amount in Controversy**

The complaint contains various allegations regarding the citizenship of the parties and the amount in controversy. Paragraphs 43 through 153 are a non-alphabetized list of the 108 plaintiffs, all of whom are alleged to reside in and own property in California.<sup>54</sup> Defendants are alleged to have “acted as Servicer or [in] some other control capacity over [the] processing [of plaintiffs’] loan[s].”<sup>55</sup> The complaint alleges that fewer than 100 plaintiffs allege claims that “would, as to them, equal or exceed the jurisdictional amount for federal jurisdiction under 28 U.S.C. § 1332(a).”<sup>56</sup>

The complaint names nine defendants: Wells Fargo Bank, N.A., which is a national banking association that is chartered in Sioux Falls, South Dakota and has its primary headquarters in San Francisco, California;<sup>57</sup> Wells Fargo Home Mortgage, a national banking association with its principal place of business in Des Moines, Iowa;<sup>58</sup> America’s Servicing Company, a national banking association with its principal place of business in Des Moines, Iowa;<sup>59</sup> Wachovia Mortgage, FSB, a national banking association with its principal place of business in Charlotte, North Carolina;<sup>60</sup> Wachovia Bank, FSB, formerly known as World Savings Bank, a national banking association with its principal place of business in Charlotte, North Carolina;<sup>61</sup> Golden West Financial Corporation, a Delaware corporation whose principal asset is World Savings Bank,

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<sup>54</sup>Complaint, ¶¶ 43-151.

<sup>55</sup>*Id.*

<sup>56</sup>*Id.*, ¶ 152.

<sup>57</sup>*Id.*, ¶ 154.

<sup>58</sup>*Id.*, ¶ 155.

<sup>59</sup>*Id.*, ¶ 156.

<sup>60</sup>*Id.*, ¶ 157.

<sup>61</sup>*Id.*, ¶ 158.

1 based in Oakland, California;<sup>62</sup> World Savings Bank, FSB, a national banking association that was  
2 “knowingly and willingly doing business” in California;<sup>63</sup> World Savings, Inc., a California  
3 corporation;<sup>64</sup> and Cal-Western Reconveyance Corporation, a California corporation.<sup>65</sup>

4 As respects the amount in controversy, the prayer for relief seeks, *inter alia*, general and  
5 special damages, exemplary damages, statutory relief, restitution, injunctive relief and attorneys’  
6 fees.<sup>66</sup> The prayer for relief reiterates that

7 “fewer than 100 plaintiffs are alleging claims or amounts in controversy that would,  
8 as to them[,] equal or exceed the jurisdictional amount for federal jurisdiction under  
9 28 U.S.C. § 1332(a) and that no relief of any kind is sought under any federal  
10 statute or rule.”<sup>67</sup>

### 11 **C. The Notice of Removal**

#### 12 **1. CAFA “Mass Action” Jurisdiction**

13 Defendants Wells Fargo and Cal-Western invoke the court’s jurisdiction over “mass  
14 actions” as defined in 28 U.S.C. § 1332(d)(11)(B)(i).<sup>68</sup> Defendants contend that 108 plaintiffs  
15 have joined to plead claims for monetary relief and seek to have those claims tried jointly because  
16 they involve common questions of law and fact.<sup>69</sup> Defendants dispute plaintiffs’ contention that  
17 the amount in controversy does not exceed the “jurisdictional amount for federal jurisdiction,” as  
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20 <sup>62</sup>*Id.*, ¶ 159.

21 <sup>63</sup>*Id.*, ¶ 160.

22 <sup>64</sup>*Id.*, ¶ 161.

23 <sup>65</sup>*Id.*, ¶ 162.

24 <sup>66</sup>*Id.* at 84.

25 <sup>67</sup>*Id.*

26 <sup>68</sup>Removal, ¶ 16.

27 <sup>69</sup>*Id.*, ¶ 17.

1 their claims exceed \$5 million in the aggregate, exclusive of interest and costs.<sup>70</sup> Noting that  
2 plaintiffs seek injunctive relief to prevent enforcement of their mortgage loans, defendants contend  
3 that the total unpaid principal on the loans exceeds \$5 million.<sup>71</sup> They also assert that each  
4 individual plaintiff's claims exceed \$75,000, excluding interest. Defendants proffer evidence that  
5 each plaintiff had a mortgage loan with an outstanding balance in excess of the jurisdictional  
6 threshold.<sup>72</sup> The notice of removal cites allegations in the complaint that "similar lawsuits" have  
7 settled for billions or hundreds of millions of dollars.<sup>73</sup>

8 Defendants also assert that the minimal diversity requirement is satisfied because at least  
9 one plaintiff is a California citizen and Wells Fargo is a South Dakota citizen.<sup>74</sup> The notice of  
10 removal states that Wells Fargo Home Mortgage, America's Servicing Company, Wachovia  
11 Mortgage, FSB, Golden West Corporation, and World Savings, Inc. are either are divisions of  
12 Wells Fargo or have merged into Wells Fargo and thus no longer exist for purposes of  
13 determining diversity of citizenship.<sup>75</sup> Moreover, defendant Wachovia Bank, FSB, has since

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15 <sup>70</sup>*Id.*, ¶ 20 (citing paragraph 360, which states that plaintiffs seek "restitution for all sums  
16 received by Defendants with respect [to their mortgage loans], including without limitation interest  
17 payments made by Plaintiffs [and any] fees paid to Defendants", and paragraph 25, which states  
18 that Wells Fargo "took from Plaintiffs and other borrowers billions of dollars in interest payments  
19 and fees").

20 <sup>71</sup>*Id.*, ¶ 23.

21 <sup>72</sup>*Id.*, ¶ 26.

22 <sup>73</sup>*Id.*, ¶ 24.

23 <sup>74</sup>*Id.*, ¶ 27.

24 <sup>75</sup>*Id.*, ¶¶ 9-15. World Savings, Inc. was formerly a subsidiary of Golden West Financial  
25 Corporation, and no longer exists. (*Id.*, ¶ 15.) A company that merges into another company  
26 adopts the citizenship of the merged company for diversity purposes. See *Meadows v. Bicrodyne*  
27 *Corp.*, 785 F.2d 670, 672 (9th Cir. 1986) (affirming that a California corporation's merger with  
28 a Delaware corporation changed the former's citizenship because "the separate existence of the  
disappearing corporations ceases" after a merger); *Kolker v. VNUS*, No. CV 10-00900-JF-PVT,  
2010 WL 3059220, \*3 (N.D. Cal. Aug. 2, 2010) ("[A]fter the merger and complete transfer of  
all of its assets and liabilities to Tyco, VNUS ceased to exist as a separate legal entity and thus  
could not properly be joined as a party to the instant action" (citation omitted)).

1 changed its name to Wells Fargo Bank South Central, N.A., which is a national bank with a home  
2 office in Houston, Texas.<sup>76</sup> Consequently, it is a Texas citizen, which also and provides a basis  
3 for finding that the minimal diversity requirement is met.<sup>77</sup>

## 4                   **2.       Diversity Jurisdiction**

5           In addition to asserting that this is a mass action over which the court has jurisdiction under  
6 CAFA, defendants invoke the court's diversity jurisdiction under 28 U.S.C. § 1332(a). As noted,  
7 most of the named defendants have either merged into Wells Fargo or no longer exist.<sup>78</sup> The only  
8 non-Wells Fargo defendant is Cal-Western. Wells Fargo contends that Cal-Western's citizenship  
9 should be disregarded because it was fraudulently joined. Wells Fargo asserts that Cal-Western  
10 was merely the trustee of plaintiffs' deeds of trust, which had contractual duties were limited by  
11 state law.<sup>79</sup> It contends that the complaint pleads no wrongdoing by Cal-Western, and that Cal-  
12 Western is referenced explicitly in the complaint only once – in an allegation that concerns its  
13 citizenship.<sup>80</sup> Wachovia Bank, FSB (formerly known as World Savings Bank, FSB), is a Texas  
14 citizen. Wells Fargo maintains that when the citizenship of defendants that have merged into  
15 Wells Fargo or ceased to exist and Cal-Western is ignored, complete diversity exists because  
16 plaintiffs are residents of California, and defendants are either South Dakota or Texas citizens.

17           Defendants cite allegations in the complaint to establish that amount in controversy exceeds  
18 \$75,000. They note that paragraph 153 alleges that “fewer than 100 plaintiffs are alleging claims  
19 in amounts that would, as to them, equal or exceed” the jurisdictional threshold.<sup>81</sup> As the  
20 complaint alleges claims on behalf of 108 individuals, defendants argue that this statement implies

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22           <sup>76</sup>*Id.*, ¶ 13.

23           <sup>77</sup>*Id.*

24           <sup>78</sup>*Id.*, ¶¶ 28-30.

25           <sup>79</sup>*Id.*, ¶¶ 31-33.

26           <sup>80</sup>*Id.*, ¶ 34 (“because Plaintiffs cannot state any cause of action against Cal-Western, it was  
27 fraudulently joined. . .”).

28           <sup>81</sup>Removal, ¶ 37.

1 that at least some plaintiffs allege damages exceeding \$75,000.

2 Finally, defendants submit evidence that each plaintiff has placed more than \$75,000 in  
3 controversy.<sup>82</sup> They proffer the declaration of Michael J. Dolan, an operations analyst in  
4 Wachovia Mortgage, FSB's Portfolio Retention Department.<sup>83</sup> Dolan states that each plaintiff for  
5 whom he could locate records has or had a mortgage loan exceeding \$75,000 with defendants.  
6 Defendants alternatively assert that an order setting aside even one of the foreclosure sales at issue  
7 in this litigation would involve a sum greater than \$75,000, and permit the court to exercise  
8 supplemental jurisdiction over causes of action involving less than that amount.<sup>84</sup> See 28 U.S.C.  
9 § 1367(a).

## 11 II. DISCUSSION

### 12 A. Plaintiffs' Motion for Remand

#### 13 1. Legal Standards Governing Removal Jurisdiction

14 The right to remove a case to federal court is entirely a creature of statute. See *Libhart v.*  
15 *Santa Monica Dairy Co.*, 592 F.2d 1062, 1064 (9th Cir. 1979). The removal statute, 28 U.S.C.  
16 § 1441, allows defendants to remove when a case originally filed in state court presents a federal  
17 question or is between citizens of different states and involves an amount in controversy that  
18 exceeds \$75,000. See 28 U.S.C. §§ 1441(a), (b); see also 28 U.S.C. §§ 1331, 1332(a). Only  
19 state court actions that could originally have been filed in federal court can be removed. 28  
20 U.S.C. § 1441(a); see *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987); *Ethridge v.*  
21 *Harbor House Rest.*, 861 F.2d 1389, 1393 (9th Cir. 1988). "[J]urisdiction in a diversity case is  
22 determined at the time of removal." *American Dental Industries, Inc. v. EAX Worldwide, Inc.*,  
23 228 F.Supp.2d 1155, 1157 (D. Or. 2002) (citing *St. Paul Mercury Indemnity Co. v. Red Cab Co.*,

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24  
25 <sup>82</sup>*Id.*

26 <sup>83</sup>Declaration of Michael J. Dolan in Support of Removal ("Dolan Decl."), Docket No. 4  
27 (Sept. 16, 2011).

28 <sup>84</sup>Removal, ¶ 38.

1 303 U.S. 283, 289 (1938) (“The inability of plaintiff to recover an amount adequate to give the  
2 court jurisdiction does not show his bad faith or oust the jurisdiction. . . . Events occurring  
3 subsequent to the institution of suit which reduce the amount recoverable below the statutory limit  
4 do not oust jurisdiction”).

5 The Ninth Circuit “strictly construe[s] the removal statute against removal jurisdiction,”  
6 and “[f]ederal jurisdiction must be rejected if there is any doubt as to the right of removal in the  
7 first instance.” *Gaus v. Miles, Inc.*, 980 F.2d 564, 566 (9th Cir. 1992) (citing *Boggs v. Lewis*,  
8 863 F.2d 662, 663 (9th Cir. 1988), *Takeda v. Northwestern Nat’l Life Ins. Co.*, 765 F.2d 815,  
9 818 (9th Cir. 1985), and *Libhart*, 592 F.2d at 1064). “The ‘strong presumption’ against removal  
10 jurisdiction means that the defendant always has the burden of establishing that removal is  
11 proper.” *Id.* (citing *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 712 n. 3 (9th  
12 Cir. 1990), and *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1195 (9th Cir. 1988)).

## 13 **2. Requirements for Jurisdiction as a CAFA Mass Action**

14 CAFA supplements the original removal statute, giving district courts, *inter alia*, original  
15 jurisdiction over a “mass action” in which the amount of controversy exceeds \$5,000,000,  
16 exclusive of interests and costs, and minimal diversity exists. See 28 U.S.C. § 1332(d)(11)(A)  
17 (“For purposes of this subsection and section 1453, a mass action shall be deemed to be a class  
18 action removable under paragraphs (2) through (10) if it otherwise meets the provisions of those  
19 paragraphs”). 28 U.S.C. § 1332(d)(11)(B)(i) defines “mass action” as “any civil action . . . in  
20 which monetary relief claims of 100 or more persons are proposed to be tried jointly on the  
21 ground that the plaintiffs’ claims involve common questions of law or fact, except that jurisdiction  
22 shall exist only over those plaintiffs whose claims in a mass action satisfy the jurisdictional amount  
23 requirements. . . .”

24 Essentially, “CAFA provides that a qualifying mass action ‘shall be deemed to be a class  
25 action’ removable to federal court under the Act, so long as the rest of CAFA’s jurisdictional  
26 requirements are met. Among these requirements, the aggregate amount in controversy must  
27 exceed ‘\$5,000,000, exclusive of interest and costs,’ and at least one plaintiff must be a citizen  
28 of a state or foreign state different from that of any defendant. In addition, there must be minimal



1 diversity between the parties.’” *Tanoh v. Dow Chemical Co.*, 561 F.3d 945, 952 (9th Cir. 2009)  
2 (quoting 28 U.S.C. § 1332(d)(11)(A)).

3 CAFA’s mass action provisions contain a number of exceptions, however. As the mass  
4 action statutes explicitly incorporate the other requirements necessary to maintain a *class* action,  
5 28 U.S.C. § 1332(d)(11)(A), any exceptions to the court’s jurisdiction under CAFA’s class action  
6 provisions also apply. See 28 U.S.C. § 1332(d)(3) (setting forth various situations in which the  
7 court may decline to exercise jurisdiction over a class action “in the interests of justice and looking  
8 at the totality of the circumstances”); *id.* § 1332(d)(4) (setting forth circumstances in which the  
9 district court is required to decline to exercise jurisdiction). In addition, 28 U.S.C.  
10 § 1332(d)(11)(B)(i) provides that in a mass action, “jurisdiction shall exist only over those  
11 plaintiffs whose claims in a mass action satisfy the jurisdictional amount requirements under  
12 subsection (a).”

13 The mass action-specific exceptions are found in 28 U.S.C. § 1332(d)(11)(B), which states:

14 “[T]he term ‘mass action’ shall not include any civil action in which –

15 (I) all of the claims in the action arise from an event or occurrence in the State in  
16 which the action was filed, and that allegedly resulted in injuries in that State or in  
17 States contiguous to that State;

18 (II) the claims are joined upon motion of a defendant;

19 (III) all of the claims in the action are asserted on behalf of the general public (and  
20 not on behalf of individual claimants or members of a purported class) pursuant to  
21 a State statute specifically authorizing such action; or

22 (IV) the claims have been consolidated or coordinated solely for pretrial  
23 proceedings.”

### 24 **3. Whether CAFA’s Mass Action Requirements Are Met**

25 The parties do not dispute: (1) that the number of plaintiffs in this action exceeds 100;  
26 (2) that “plaintiffs’ claims involve common questions of law or fact,” 28 U.S.C. § 1332(d)(11)(B);  
27 (3) and that the citizenship of the parties is minimally diverse, as all the plaintiffs are citizens of  
28 California and Wells Fargo Bank South Central, N.A. (formerly known as Wachovia Bank, FSB)

1 is a Texas citizen.<sup>85</sup> The parties' disputes concerns whether the amount in controversy  
2 requirement is met, and whether various exceptions to CAFA apply.<sup>86</sup>

3 **a. The Applicable Burden of Proof**

4 Although the burden of proving that removal jurisdiction exists rests with defendants, the  
5 burden of proof they must satisfy differs depending on the nature of the damages allegations  
6 included in plaintiffs' complaint. "[W]hen the plaintiff[s] fail[ ] to plead a specific amount of  
7 damages, . . . defendant[s] seeking removal 'must prove by a preponderance of the evidence that  
8 the amount in controversy requirement has been met.'" *Lowdermilk v. United States Bank Nat'l*  
9 *Assoc.*, 479 F.3d 994, 998 (9th Cir. 2007) (quoting *Abrego Abrego v. The Dow Chemical Co.*,  
10 443 F.3d 676, 683 (9th Cir. 2006) (per curiam)); see also *Guglielmino v. McKee Foods Corp.*,  
11 506 F.3d 696, 700 (9th Cir. 2007) ("In the Jurisdiction and Venue section, it is alleged that '[t]he  
12 damages to each Plaintiff are less than \$75,000. In addition, the sum of such damages and the  
13 value of injunctive relief sought by plaintiff in this action is less than \$75,000.' . . . [B]ecause  
14 the allegation in the Jurisdiction and Venue section is not repeated in the Prayer for Relief and

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15 <sup>85</sup>Although the complaint alleges that plaintiffs are California residents, rather than citizens,  
16 there is no indication that plaintiffs are citizens of states that would destroy minimal diversity here.

17 <sup>86</sup>At oral argument, plaintiffs invoked 28 U.S.C. § 1332(d)(11)(B)(ii)(I), which provides  
18 that federal courts do not have jurisdiction to hear cases in which "all of the claims in the action  
19 arise from an event or occurrence in the State in which the action was filed, and that allegedly  
20 resulted in injuries in that State or in States contiguous. . . ." That provision, however, has been  
21 narrowly interpreted to refer to claims involving a "single event or occurrence, such as an  
22 environmental accident, that gives rise to the claims of all plaintiffs." *Dunn v. Endoscopy Center*  
*of Southern Nevada*, No. 2:11-cv-00560-RLH-PAL, 2011 WL 5509004, \*2 (D. Nev. Nov. 7,  
23 2011) (quoting *Lafalier v. Cinnabar Serv. Co., Inc.*, No. 10-cv-0005, 2010 WL 1486900, \*4  
(N.D. Okla. Apr. 13, 2010)).

24 The legislative history of the section confirms that this exception applies only in cases  
25 involving a single "event or occurrence," and that it explicitly excludes product liability cases,  
26 since "[t]he sale of a product to different people does not qualify as an event." S.Rep. No.  
27 109-14, at 47, reprinted in 2005 U.S.C.C.A .N. 3, 44. While plaintiffs' factual allegations  
28 concern an allegedly fraudulent scheme, that scheme involved a multitude of individual  
transactions involving many different parties. The claims, therefore, can hardly be said to be  
based on a single, unitary "event." Because the parties did not brief this issue, no authority has  
been cited suggesting that 28 U.S.C. § 1332(d)(11)(B)(ii)(I) should be extended to cover  
circumstances such as this. Consequently, the court declines to remand on this basis.

1 does not take account of attorneys' fees, accounting of moneys, or payment of back taxes and  
2 benefits, the complaint fails to allege a sufficiently specific total amount in controversy"). See  
3 also *Dupre v. General Motors*, No. CV-10-00955-RGK (Ex), 2010 WL 3447082, \*2 (C.D. Cal.  
4 Aug. 27, 2010) ("As in *Guglielmino*, the complaint is facially unclear as to whether the requisite  
5 total amount in controversy has been pled, and GM 'bears the burden of establishing, by a  
6 preponderance of the evidence, that the amount in controversy exceeds [the jurisdictional  
7 amount]'").

8 "[I]f the complaint alleges damages in excess of the federal amount-in-controversy  
9 requirement, [however,] then the amount-in-controversy requirement is presumptively satisfied  
10 unless 'it appears to a 'legal certainty' that the claim is actually for less than the jurisdictional  
11 minimum.'" *Id.* (quoting *Abrego Abrego*, 443 at 683 n. 8). Similarly, a defendant seeking to  
12 remove an action where the complaint affirmatively limits the amount in controversy to avoid  
13 federal jurisdiction must demonstrate to a legal certainty that the amount in controversy satisfies  
14 the jurisdictional threshold. The *Lowdermilk* court outlined this variable standard of proof for two  
15 reasons. First, it noted that "federal courts . . . are courts of limited jurisdiction and . . . strictly  
16 construe [their] jurisdiction." *Id.* at 998 (citing *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511  
17 U.S. 375, 377 (1994)). Second, it noted the "well established [proposition] that the plaintiff is  
18 'master of her complaint' and can plead to avoid federal jurisdiction." *Id.* at 999. Taking these  
19 principles together, the court concluded that "subject to a 'good faith' requirement in pleading,  
20 a plaintiff may sue for less than the amount she may be entitled to if she wishes to avoid federal  
21 jurisdiction and remain in state court." *Id.* (citing *St. Paul Mercury Indem. Co.*, 303 U.S. at 288-  
22 89); see also *id.* at 999 ("By adopting 'legal certainty' as the standard of proof, we guard the  
23 presumption against federal jurisdiction and preserve the plaintiff's prerogative, subject to the  
24 good faith requirement, to forgo a potentially larger recovery to remain in state court").

25 Here, plaintiffs do not allege the aggregate amount in controversy on their claims. They  
26 also do not allege a specific amount in controversy for *each individual* plaintiff. Instead, the  
27 complaint pleads that "*fewer than 100 plaintiffs are alleging claims or amounts in controversy that*  
28 *would, as to them[,] equal or exceed the jurisdictional amount for federal jurisdiction under 28*

1 *U.S.C. § 1332(a).*<sup>87</sup> Although it appears that plaintiffs seek to avoid federal jurisdiction, the  
2 complaint neither pleads that the *total* aggregate amount in controversy is less than a certain  
3 amount, nor that each plaintiff's individual amount in controversy is less than \$75,000. Instead,  
4 the complaint alleges that some number of plaintiffs – fewer than 100 – allege an amount in  
5 controversy that, “as to them,.” does not exceed \$75,000.

6 This manner of pleading, however, is apparently explained by plaintiffs' interpretation of  
7 certain portions of CAFA's mass action provisions. Plaintiffs cite § 1332(d)(11)(B)(i), which  
8 states that where jurisdiction exists to hear a mass action, it “exist[s] only over those plaintiffs  
9 whose claims . . . satisfy the jurisdictional amount requirements under subsection (a).” Plaintiffs  
10 contend this means that the court has mass action jurisdiction only when “100 or more persons”  
11 *each* place an amount in controversy that exceeds \$75,000, even if the action otherwise meets  
12 CAFA's minimal diversity and aggregate amount in controversy requirements. Defendants, by  
13 contrast, urge that the court adopt the Eleventh Circuit's view that “the \$75,000 provision was not  
14 intended to bar district courts from asserting jurisdiction over the entire case if each individual  
15 plaintiff's claims do not exceed \$75,000,” so long as the numerosity and \$5 million aggregate  
16 amount in controversy thresholds are met. *Lowery v. Alabama Power Co.*, 483 F.3d 1184, 1205  
17 (11th Cir. 2007).<sup>88</sup>

18 The Ninth Circuit has twice taken note of the statutory ambiguity but declined to address  
19 the question directly. See *Abrego Abrego*, 443 F.3d at 682 (observing that the parties had raised  
20 the “thorn[y]” issue of whether “removed mass actions remain in federal court even if the  
21 plaintiffs alleging claims in excess of \$75,000 do not meet the numerosity or aggregate total  
22 amount in controversy requirement of § 1332(d),” but remanding case on other grounds); see also  
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24 <sup>87</sup>Complaint at 84 (emphasis added). See also *id.*, ¶ 153.

25 <sup>88</sup>Under the Eleventh Circuit's interpretation, the court would have to remand any  
26 individual plaintiff's claims that did not meet the \$75,000 threshold. *Lowery*, 483 F.3d at 1206-  
27 07. Even if remanding those claims brought the aggregate amount in controversy below \$5  
28 million, however, the court would retain jurisdiction so long as CAFA's requirements were met  
at the time of removal. *Id.* at 1206 (citing S. Rep. No. 109-14 at 57 (2005)).

1 *Tanoh*, 561 F.3d at 953 n. 4 (“In *Abrego Abrego*, we left open the question whether this clause  
2 requires that one hundred or more plaintiffs individually satisfy the \$75,000 amount in controversy  
3 requirement for federal diversity jurisdiction to qualify as a ‘mass action’ under CAFA. Given  
4 our disposition in this case, we once again do not decide the issue” (citation omitted)).

5 The court similarly concludes that addressing this difficult question of statutory  
6 interpretation is not necessary here to address the applicable burden of proof or to answer the  
7 ultimate question as to whether the court can exercise jurisdiction over this case. As to burden  
8 of proof, to remove a mass action under CAFA, the aggregate amount in controversy for all  
9 plaintiffs must exceed \$5 million. 28 U.S.C. § 1332(d)(2). The complaint here neither  
10 affirmatively alleges an amount in controversy of less than \$5 million, nor pleads specific amounts  
11 in controversy as to each individual plaintiff. The only allegation plaintiffs offer is that some  
12 number of plaintiffs “fewer than 100” alleges an amount in controversy less than \$75,000. This  
13 is insufficient to quantify the aggregate amount placed at issue by the complaint.

14 The ambiguity of the pleading places it squarely within the rule articulated in *Abrego*  
15 *Abrego* and *Guglielmino* that defendants must show by a preponderance of the evidence that the  
16 amount in controversy requirement is satisfied. See, e.g., *Guglielmino*, 506 F.3d at 701.

17 **b. Whether Defendants Have Met Their Burden of Proof as to**  
18 **Amount in Controversy**

19 The court thus examines whether defendants have met their burden of showing by a  
20 preponderance that the amount in controversy exceeds \$5 million. As noted, the only proof  
21 defendants proffer is the Dolan declaration. Dolan states that as an operations analyst in Wachovia  
22 Mortgage, FSB’s portfolio retention department, he has “custody over and access to various  
23 business records of Wells Fargo, and [is] familiar with Wells Fargo’s business practices and  
24 business records.”<sup>89</sup> He asserts that based on his review of those records, he has “determined that  
25 the total unpaid principal on the outstanding mortgage loans at issue in this litigation is well in  
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27  
28 <sup>89</sup>Dolan Decl., ¶ 2.

1 excess of \$5,000,000.”<sup>90</sup> No further explanation is provided and the declaration attaches no  
2 records or documents supporting Dolan’s statement. Nor does Dolan identify the records he  
3 reviewed to reach this conclusion.

4 Dolan also states that “each of the Plaintiffs has, or at one time had, a mortgage loan with  
5 an outstanding principal balance in excess of \$75,000.”<sup>91</sup> Dolan does not specify the amount of  
6 any plaintiff’s outstanding balance, how many have past balances as opposed to current balances,  
7 nor what the amounts of any current balances may be. With respect to the plaintiffs who allege  
8 wrongful foreclosure claims, Dolan has determined that at the time their properties were sold at  
9 foreclosure, “each loan had an unpaid principal balance in excess of \$75,000.”<sup>92</sup> Once again,  
10 however, no documents are provided supporting this contention.

11 Dolan notes that he could find no records for thirteen of the 108 plaintiffs and was unable  
12 to “locate any loans in [their] names.”<sup>93</sup> Two of the individuals about whom he lacks information  
13 allege wrongful foreclosure claims.<sup>94</sup>

14 Defendants contend that Dolan’s declaration is sufficient to demonstrate an aggregate  
15 amount in controversy exceeding \$5 million. This contention is largely based on their assertion  
16 that whatever the allegations of the complaint, plaintiffs actually seek to enjoin foreclosure of their  
17 properties or to unwind foreclosures that have already taken place. As evidence of this, they cite  
18 allegations challenging defendants’ rights to enforce the mortgages and foreclose on plaintiffs’  
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22 <sup>90</sup>*Id.*, ¶ 11.

23 <sup>91</sup>*Id.*, ¶ 12.

24 <sup>92</sup>*Id.*

25 <sup>93</sup>*Id.* at n. 1. These plaintiffs are Rosa Courtney, Rebecca Sierra, David and Gaviela  
26 Zamora, Daniel and Cosmina Spatacean, Paul and Cynthia Pease, Renan and Jeannette Pulicio,  
27 and Terri A. and Rhonda K. Penkert. (*Id.*)

28 <sup>94</sup>*Id.* at n. 2. These two individuals are Rosa Courtney and Katherine Ward.



1 properties.<sup>95</sup> These allegations, defendants contend, indicate that plaintiffs have placed the entire  
2 value of their mortgages at issue. See *Chapman v. Deutsche Bank Nat. Trust Co.*, 651 F.3d 1039,  
3 1045 n. 2 (9th Cir. 2011) (“Here, the object in litigation is the Property, which was assessed at  
4 a value of more than \$200,000, and therefore satisfies the amount-in-controversy requirement”);  
5 *Garfinkle v. Wells Fargo Bank*, 483 F.2d 1074, 1076 (9th Cir. 1973) (treating the value of real  
6 property as the amount in controversy in an action to enjoin a foreclosure sale). “Even if the  
7 property at issue has already been sold in foreclosure by the defendant, as is the case here, the  
8 property may still be the object of the litigation when the plaintiff sues for injunctive [or  
9 declaratory] relief.” *Reyes v. Wells Fargo Bank, N.A.*, No. C-10-01667 JCS, 2010 WL 2629785,  
10 \*4-5 (N.D. Cal. June 29, 2010). See also *Kehoe v. Aurora Loan Services LLC*, No.  
11 3:10-cv-00256-RCJ-RAM, 2010 WL 4286331, \*3-4 (D. Nev. Oct. 20, 2010) (“Based on the  
12 foregoing, the Court finds that the amount in controversy exceeds the jurisdictional limit. In cases  
13 seeking injunctive relief from a foreclosure sale, the value of the property at issue is the object of  
14 the litigation for the purposes of determining the amount in controversy. In this matter, Plaintiffs  
15 are seeking to undo a non-judicial foreclosure sale in which the property was sold for  
16 approximately \$981,000. Because the object of the litigation is worth significantly more than  
17 \$75,000, the amount in controversy requirement has been met and this case was properly  
18 removed”); *Barrus v. Recontrust Co., N.A.*, No. C11-618-RSM, 2011 WL 2360206, \*3 (W.D.  
19 Wash. June 9, 2011) (“Here, Plaintiffs seek a declaration ‘canceling’ the Deed of Trust that  
20 secures their home loan and an injunction of the upcoming foreclosure sale of their home. The  
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22 <sup>95</sup>See, e.g., Complaint, ¶ 27 (“Defendants lack the legal right to enforce the foregoing  
23 because they have not complied with disclosure requirements intended to assure that mortgages  
24 are funded with monies obtained lawfully”); *id.*, ¶ 29 (“Accordingly, Defendants are not and were  
25 not at the relevant times allowed legally to enforce the notes or deeds of trust”); *id.*, ¶ 202  
26 (“Defendants have made demand for payment on the Plaintiffs with respect to Plaintiffs’ properties  
27 at a time when Defendants are incapable of establishing . . . who owns the promissory notes  
28 Defendants are purportedly servicing”); *id.*, ¶ 250 (“Defendants continue to demand payment and  
to foreclose and threaten to foreclose on Plaintiffs, despite the facts that . . . Defendants have no  
proof that they own the notes and deeds of trust they seek to enforce . . .”); *id.*, ¶ 321  
 (“Defendants seek to enforce the loans and mortgages irrespective of this massive fraud”).

1 loan amount – the object of the litigation – is \$286,750. Accordingly, the amount in controversy  
2 is well over the \$75,000 threshold” (citations omitted)); *Delgado v. Bank of America Corp.*, No.  
3 1:09cv01638 AWI DLB, 2009 WL 4163525, \*6 (E.D. Cal. Nov. 23, 2009) (accepting an affidavit  
4 submitted by defendants that appraised the property plaintiffs sought to reclaim at more than  
5 \$75,000 as evidence that the amount in controversy requirement was satisfied).

6 While the complaint is hardly a model of clarity, the court believes that defendants have  
7 not read it accurately. It is true that the pleading contains various allegations questioning  
8 defendants’ right to enforce the mortgages in question. A closer examination of each of the claims  
9 and causes of action, however, does not support the view that plaintiffs seek injunctive or  
10 declaratory relief that places the entire value of their mortgages at issue. See *Naiyan v. Sodexo,*  
11 *Inc.*, No. CV 10–9872 PSG (CWx), 2011 WL 1543371, \*2 (C.D. Cal. Apr. 25, 2011) (assessing  
12 the amount in controversy by examining each claim). The first through third causes of action  
13 allege claims for fraudulent concealment, intentional misrepresentation, and negligent  
14 misrepresentation respectively. Plaintiffs do not seek injunctive relief on these claims, but rather  
15 damages caused by plaintiffs’ reliance on defendants’ misconduct. While the complaint contends  
16 that defendants do not have a valid right to enforce the mortgages, these allegations are included  
17 to show that defendants misrepresented the facts by holding themselves out as the owners of valid  
18 loans and mortgages. Plaintiffs describe the damages they seek as the “loss of [their] equity  
19 investments,”<sup>96</sup> i.e., the “loss of equity in their houses, costs and expenses related to protecting  
20 themselves, reduced credit scores,” etc.<sup>97</sup> Defendants’ evidence does not quantify these damages  
21 in any respect. Rather, in two somewhat conclusory paragraphs, Dolan addresses only the amount  
22 of the mortgage loans that 95 of the plaintiffs had or have; he provides no information regarding  
23 the thirteen plaintiffs for whom he could find no records. The fact that plaintiffs “at one time  
24 had” loans exceeding \$75,000 says nothing about their current outstanding mortgage balances,  
25 which potentially could be below that amount.

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27 <sup>96</sup>Complaint, ¶ 319.

28 <sup>97</sup>*Id.*, ¶¶ 302, 325, 336.



1 The fourth cause of action arises under the UCL, and seeks restitution “for all sums  
2 received by Defendants with respect [to the mortgages], including, without limitation, interest  
3 payments . . . , fees . . . , and premiums received upon selling the mortgages at an inflated  
4 value.”<sup>98</sup> The claim seeks injunctive relief to prevent defendants “from any further concealment  
5 with respect to the sale of notes and mortgages,” and to enjoin them from further unlawful  
6 conduct.<sup>99</sup> Like the three claims that preceded it, this cause of action does not put the entire value  
7 of plaintiffs’ properties at issue, nor does it seek to block enforcement of the mortgages.  
8 Defendants have adduced no evidence regarding the aggregate value of payments or interest they  
9 received.

10 The fifth cause of action, which is asserted by eleven plaintiffs, alleges wrongful  
11 foreclosure. Defendants were, as noted, unable to provide any information about two of these  
12 individuals; thus, Dolan’s calculation concerns nine individuals only. The claim alleges that  
13 “[p]laintiffs were dispossessed of the value of [their] homes” and that the foreclosure sales were  
14 void.<sup>100</sup> The sixth and final cause of action, which is asserted by a different subset of nine  
15 plaintiffs who entered into Pick-A-Pay mortgage agreements with defendants, alleges a breach of  
16 contract claim.<sup>101</sup> These plaintiffs contend that defendants breached the mortgage contract by  
17 prohibiting them from choosing two of the four payment options available under the contract,  
18 which caused them to default and led to the foreclosure of their homes, or the “commenc[ement]  
19 [of] the foreclosure process.”<sup>102</sup> It also alleges that defendants’ material breaches damaged  
20 plaintiffs by “[c]ausing Plaintiffs’ properties to enter into the foreclosure process and be  
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23 <sup>98</sup>Complaint, ¶ 360.

24 <sup>99</sup>*Id.*, ¶ 361.

25 <sup>100</sup>*Id.*, ¶ 374.

26 <sup>101</sup>These plaintiffs are Allen and Rose Bickerstaff, Stirling and Michelle Hale, Robert and  
27 Geraldine Harrick, Cristina Magana, and William and Janet Schraner. (Complaint at 81.)

28 <sup>102</sup>*Id.*, ¶ 386.

1 foreclosed. . . .”<sup>103</sup> The prayer for relief seeks injunctive relief under the fourth cause of action  
2 and “any other causes of action for which such relief may be available. . . .” It is thus possible  
3 that plaintiffs seek to enjoin or set aside foreclosure sales.<sup>104</sup>

4 Unlike the claims that precede them, the fifth and sixth claims – which are asserted by  
5 small subsets of individual plaintiffs – implicate the foreclosure or threatened foreclosure of their  
6 homes and may fairly be said to place the full value of their properties into controversy. The  
7 Dolan declaration contains minimal information about nine of the plaintiffs who allege wrongful  
8 foreclosure. It reports only that each of their “loan[s] had an unpaid principal balance in excess  
9 of \$75,000.”<sup>105</sup> The declaration contains no information concerning the nine individuals who have  
10 pled a breach of contract claim. The court has no information that would permit it to conclude  
11 that defendants have shown by a preponderance of the evidence that the wrongful foreclosure  
12 claims involves aggregate damages of more than \$5 million. The same is true of the breach of  
13 contract claims. Defendants’ evidence is thus insufficient to meet their burden.

14 Defendants also contend that the amount in controversy is satisfied by allegations that  
15 purport to describe the magnitude of the fraudulent scheme at issue here. Specifically, defendants  
16 cite paragraphs 25 and 360 of the complaint. Paragraph 25 states that “Wells Fargo and the other  
17 Defendants took from Plaintiffs and other borrowers billions of dollars in interest payments and  
18 fees.”<sup>106</sup> Because plaintiffs seek restitution of “all sums received by Defendants with respect [to  
19 their mortgages], including without limitation interest payments [and] fees,”<sup>107</sup> defendants assert  
20 that they have placed “billions of dollars” in controversy. This interpretation does not withstand  
21 scrutiny. As noted, the complaint alleges a wide-ranging fraudulent scheme involving the homes  
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23 <sup>103</sup>*Id.*, ¶ 384(c).

24 <sup>104</sup>*Id.* at 84.

25 <sup>105</sup>Dolan Decl., ¶ 12.

26 <sup>106</sup>Complaint, ¶ 25.

27 <sup>107</sup>*Id.*, ¶ 360.

1 of individuals across the country. Given this fact, the allegation that “[p]laintiffs *and other*  
2 *borrowers*” were collectively deprived of “billions of dollars” does not show that the amount in  
3 controversy *in this litigation* is similarly huge. Because this is a mass action, rather than a class  
4 action, the only damages at issue are those the *named plaintiffs* suffered. Allegations regarding  
5 borrowers other than plaintiffs are not relevant to calculating the amount in controversy.

6 Defendants’ reliance on other allegations concerning sizable settlements is similarly  
7 unavailing.<sup>108</sup> The complaint contains a number of allegations concerning settlements into which  
8 Wells Fargo entered to resolve other lawsuits. Paragraph 230, for example, alleges that Wells  
9 Fargo settled a lawsuit filed by the California Attorney General that alleged predatory practices  
10 involving the Pick-A-Pay mortgages; the bank purportedly agreed to make \$2 billion in loan  
11 modifications.<sup>109</sup> The next paragraph alleges that Wells Fargo agreed to settle “a lawsuit” by  
12 making \$600 million in loan modifications and “fund[ing] a \$50 million settlement fund.”<sup>110</sup>  
13 Paragraph 247 refers to a *Huffington Post* article, which purportedly stated that Wells Fargo “had  
14 agreed to pay \$85 million to settle civil claims. . . .”<sup>111</sup> Plaintiffs assert that these settlements  
15 were in cases in which government agencies and private parties asserted claims of wrongdoing  
16 “similar to the wrongful acts alleged” in this case.<sup>112</sup>

17 Defendants contend that plaintiffs’ allegations concerning these settlements constitute  
18 admissions that the amount in controversy in *this* litigation exceeds \$5 million. While settlements  
19 and jury verdicts in similar cases can provide evidence of the amount in controversy, the cases  
20 must be factually identical or, at a minimum, analogous to the case at issue. See *Simmons v. PCR*  
21 *Technology*, 209 F.Supp.2d 1029, 1034 (N.D. Cal. 2002) (considering damages awarded in a “not  
22

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23 <sup>108</sup>Removal, ¶ 24 (quoting Complaint, ¶¶ 230-31, 247).

24 <sup>109</sup>Complaint, ¶ 230.

25 <sup>110</sup>*Id.*, ¶ 231.

26 <sup>111</sup>*Id.*, ¶ 247.

27 <sup>112</sup>*Id.*, ¶ 228.

1 perfectly analogous” case as evidence “that emotional distress damages in a successful  
2 employment discrimination case may be substantial”); *Conrad Associates v. Hartford Accident &*  
3 *Indemnity Co.*, 994 F.Supp. 1196, 1200 (N.D. Cal. 1998) (accepting evidence of jury verdicts on  
4 analogous punitive damages claims as sufficient to show that the amount in controversy  
5 requirement was met). Defendants here proffer no evidence that the lawsuits and settlements  
6 alleged in the complaint are factually or legally similar to plaintiffs’ claims. The complaint alleges  
7 few details concerning the settlements; there is absolutely *no* indication that the claims purportedly  
8 settled were similar in size or scope to those asserted in this litigation. At oral argument, Wells  
9 Fargo’s lawyer described this case as a “microcosm” of the cases referenced in the complaint; it  
10 appears therefore that even defendants understand that the claims at issue here are a subset, and  
11 most probably a small subset, of the claims at issue in the governmental lawsuits referenced in the  
12 complaint. Similarly, the fact that Wells Fargo has allegedly paid \$85 million to settle all or some  
13 of the civil claims filed against it speaks not at all to the value of the claims of the 108 plaintiffs  
14 who have sued in this case. The court declines defendants’ invitation to extrapolate from vague  
15 allegations regarding settlements of litigation initiated by governmental entities – which obviously  
16 alleged misconduct larger in scope than plaintiffs allege here – or from allegations regarding the  
17 overall sums defendants have purportedly paid to settle similar claims – that the amount in  
18 controversy here exceeds \$5 million. Defendants’ argument obfuscates the fact that they have  
19 failed to proffer concrete evidence regarding the actual amount in controversy in this case. It is  
20 defendants’ burden to adduce evidence regarding the amount in controversy. The allegations in  
21 plaintiffs’ complaint that they cite do not suffice to satisfy this burden.

22 “The strong presumption against removal jurisdiction necessarily means that federal  
23 jurisdiction ‘must be rejected if there is any doubt as to the right of removal in the first instance.’”  
24 *Sauer v. Prudential Ins. Co. of Am.*, No. 2:11-cv-08699-JHN-RZ, 2011 WL 5117772, \*1  
25 (C.D.Cal. Oct. 28, 2011) (quoting *Gaus*, 980 F.2d at 566); see also *Haase v. Aerodynamics Inc.*,  
26 No. 2:09-cv-01751-MCE-GGH, 2009 WL 3368519, \*2 (E.D.Cal. Oct. 19, 2009) (“[I]f there is  
27 any doubt as to the right of removal in the first instance, remand must be granted”). As  
28 defendants have failed to meet their burden of proving that the amount in controversy exceeds \$5

1 million by a preponderance of the evidence, the court lacks jurisdiction over this case as a CAFA  
2 mass action.<sup>113</sup>

3  
4 <sup>113</sup>Given the court's conclusion regarding defendants' proof of the amount in controversy,  
5 it declines to address the parties' arguments as to whether CAFA's "local controversy" and "home  
6 state" exceptions apply here. The court observes, however, that the "local controversy" exception  
7 may apply here. This exception requires that the district court decline jurisdiction over any class  
8 action in which:

9 "(i)(I) greater than two-thirds of the members of all proposed plaintiff classes in the  
10 aggregate are citizens of the State in which the action was originally filed;

11 "(II) at least 1 defendant is a defendant –

12 "(aa) from whom significant relief is sought by members of the  
13 plaintiff class;

14 "(bb) whose alleged conduct forms a significant basis for the claims  
15 asserted by the proposed plaintiff class; and

16 "(cc) who is a citizen of the State in which the action was originally  
17 filed; and

18 "(III) principal injuries resulting from the alleged conduct or any related conduct  
19 of each defendant were incurred in the State in which the action was originally  
20 filed; and

21 "(ii) during the 3-year period preceding the filing of that class action, no other class  
22 action has been filed asserting the same or similar factual allegations against any of  
23 the defendants on behalf of the same or other persons." 28 U.S.C.  
24 § 1332(d)(4)(A).

25 Here, all of the plaintiffs are California citizens. In Part II.A.4.a.iii, *infra*, the court concludes  
26 that Cal-Western has not been fraudulently joined. Consequently, at least one defendant is also  
27 a California citizen. The complaint pleads a number of claims against each of the defendants,  
28 including Cal-Western, and seeks a variety of forms of relief from them in the aggregate. The  
complaint thus seeks "significant relief" from Cal-Western. In addition, Cal-Western's conduct  
"forms a significant basis for the claims asserted" by plaintiffs, given that it purportedly played  
a key role in effecting a number of the allegedly wrongful foreclosures, and also purportedly  
conspired with other defendants to commit assorted violations of California's Unfair Competition  
Law. See *Kaufman v. Allstate New Jersey Ins. Co.*, 561 F.3d 144, 155 (3d Cir. 2009) ("The  
provision does not require that the local defendant's alleged conduct form a basis of each claim  
asserted; it requires the alleged conduct to form a significant basis of all the claims asserted").  
Moreover, the requirement that "principal injuries resulting from the alleged conduct . . . were  
incurred in the State" in which the action was filed is satisfied, 28 U.S.C. § 1332(d)(4)(A)((i)(III),  
as all plaintiffs are California citizens who allege injuries resulting from mortgage transactions  
consummated within the state.

For this exception to apply, it must be the case that "no other class action . . . asserting  
the same or similar factual allegations" have been filed in the last three years. Defendants contend  
that *Nelson v. Wells Fargo Bank, N.A.*, CV No. 11-05573 DMG (Ssx), alleges "almost identical"

1                   **4.       Whether the Court Has Diversity Jurisdiction to Hear this Action**

2           Defendants also invoke the court’s diversity jurisdiction over each of the individual  
3 plaintiffs’ claims.<sup>114</sup> “The district courts . . . have original jurisdiction of all civil actions where  
4 the matter in controversy exceeds the sum or value of \$75,000, exclusive of interest and  
5 costs. . . .” 28 U.S.C. § 1332(a); see also *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d  
6 1089, 1090 (9th Cir. 2003) (“[J]urisdiction founded on [diversity] requires that the parties be in  
7 complete diversity and the amount in controversy exceed \$75,000”). In any case where subject  
8 matter jurisdiction is premised on diversity, there must be complete diversity, i.e., all plaintiffs  
9 must have citizenship different than all defendants. See *Strawbridge v. Curtis*, 7 U.S. (3 Cranch)  
10 267 (1806); see also *Caterpillar Inc. v. Lewis*, 519 U.S. 61, 68 & n. 3 (1996).

11           The parties dispute a number of issues concerning diversity jurisdiction. First, they  
12 disagree as to whether Wells Fargo should be considered a California citizen; if it is, this would  
13 defeat complete diversity. Second, defendants contend that plaintiffs have fraudulently joined Cal-  
14 Western Reconveyance; if this is not the case, the fact that it is a defendant would also defeat  
15 diversity. Finally, the parties dispute whether defendants have adequately proved the amount in  
16 controversy. The court addresses each issue in turn.

17                   **a.       Whether the Complete Diversity Requirement Is Satisfied**

18  
19 facts against Wells Fargo. (Remand Opp. at 20.) Despite the purported identity of facts, neither  
20 defendants nor plaintiffs sought to relate this case to *Nelson*, or to consolidate the actions before  
21 the same judge. The *Nelson* case involved different defendants represented by different counsel.  
22 Judge Gee evaluated whether the two cases were related, and concluded that while they “share[d]  
23 some common defendants and legal theories, there is no overlap of plaintiffs and no overlap with  
24 respect to *certain major defendants*.” (Order re: Transfer, Docket No 34 (Dec. 21, 2011)  
(emphasis added).) Given the many apparent dissimilarities between the two cases, it is not at all  
25 clear that the *Nelson* mass action precludes this court’s exercise of jurisdiction under CAFA.

26           Plaintiffs raised this issue in its motion, but did not respond to defendants’ arguments  
27 against it in their reply brief, instead focusing on the issue of Wells Fargo’s citizenship. It is  
28 plaintiffs’ burden to demonstrate that this exception applies. *Serrano v. 180 Connect, Inc.*, 478  
F.3d 1018, 1024 (9th Cir. 2007). The court notes the possible applicability of the exception,  
however, as it may provide yet another reason why CAFA’s mass action provisions do not provide  
a jurisdictional basis for hearing this case in federal court.

<sup>114</sup>Removal, ¶ 28.

**i. Legal Standard Governing the Citizenship of National  
Banking Associations for Diversity Purposes**

28 U.S.C. § 1348 states:

“The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association established in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter. All national banking associations shall, for the purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively located.”

In *Wachovia Bank v. Schmidt*, 546 U.S. 303 (2006), the United States Supreme Court considered whether, as used in § 1348, “located . . . signal[ed] . . . that the bank’s citizenship is determined by the place designated in the bank’s articles of association as the location of its main office,” or rather “that a national bank is a citizen of every State in which it maintains a branch[.]” *Id.* at 306-07. The Court recognized that “‘located’ is not a word of ‘enduring rigidity,’ but one that gains its precise meaning from context,” and therefore considered the unique historical circumstances giving rise to Congress’s adoption of § 1348. *Id.* at 307 (citing *Citizens & Southern Nat. Bank v. Bougas*, 434 U.S. 35, 44 (1977)). It reasoned:

“When Congress first authorized national banks in 1863, it specified that any ‘suits, actions, and proceedings by and against [them could] be had’ in federal court. National banks thus could ‘sue and be sued in the federal district and circuit courts solely because they were national banks, without regard to diversity, amount in controversy or the existence of a federal question in the usual sense.’ State banks, however, like other state-incorporated entities, could initiate actions in federal court only on the basis of diversity of citizenship or the existence of a federal question. Congress ended national banks’ automatic qualification for federal jurisdiction in



1 1882. An enactment that year provided in relevant part:

2 ‘[T]he jurisdiction for suits hereafter brought by or against any association  
3 established under any law providing for national-banking associations . . . shall be  
4 the same as, and not other than, the jurisdiction for suits by or against banks not  
5 organized under any law of the United States which do or might do banking  
6 business where such national-banking associations may be doing business when  
7 such suits may be begun[.]’ . . .

8 Under this measure, national banks could no longer invoke federal-court jurisdiction  
9 solely ‘on the ground of their Federal origin;’ instead, for federal jurisdictional  
10 purposes, Congress placed national banks ‘on the same footing as the banks of the  
11 state where they were located.’” *Id.* at 309-10 (citations omitted).

12 The Court further explained that, “[i]n 1887 revisions to prescriptions on federal  
13 jurisdiction, Congress replaced the 1882 provision on jurisdiction over national banks and first  
14 used the ‘located’ language today contained in § 1348. . . . Like its 1882 predecessor, the 1887  
15 Act ‘sought to limit . . . the access of national banks to, and their suability in, the federal courts  
16 to the same extent to which non-national banks [were] so limited.’” *Id.* at 310-11. Addressing  
17 the precise question before it, the Court noted that “[n]ot until 1994 did Congress provide broad  
18 authorization for national banks to establish branches across state lines.” *Id.* at 314. Considering  
19 Congress’ purpose of achieving jurisdictional parity between state and national banks, and the fact  
20 that the relevant language in § 1348 was placed in the statute at a time when national banks could  
21 not operate branches outside their home state, the Court held that

22 “a national bank, for § 1348 purposes, is a citizen of the State in which its main  
23 office, as set forth in its articles of association, is located. Were we to hold, as the  
24 Court of Appeals did, that a national bank is additionally a citizen of every State in  
25 which it has established a branch, the access of a federally chartered bank to a  
26 federal forum would be drastically curtailed in comparison to the access afforded  
27 state banks and other state-incorporated entities. Congress, we are satisfied, created  
28 no such anomaly.” *Id.* at 307.



1 The Court did not decide whether, given the imprecision of the word “located,” a national  
2 bank might also be “located,” for purposes of § 1348, in the state where it maintains its principal  
3 place of business. Indeed, it specifically noted that in the case before it, the bank’s principal place  
4 of business was its main office. It stated:

5 “To achieve complete parity with state banks and other state-incorporated entities,  
6 a national banking association would have to be deemed a citizen of both the State  
7 of its main office and the State of its principal place of business. Congress has  
8 prescribed that a corporation ‘shall be deemed to be a citizen of any State by which  
9 it has been incorporated and of the State where it has its principal place of  
10 business.’ 28 U.S.C. § 1332(c)(1). The counterpart provision for national banking  
11 associations, § 1348, however, does not refer to ‘principal place of business;’ it  
12 simply deems such associations ‘citizens of the States in which they are respectively  
13 located.’ The absence of a ‘principal place of business’ reference in § 1348 may  
14 be of scant practical significance for, in almost every case, as in this one, the  
15 location of a national bank’s main office and of its principal place of business  
16 coincide.” *Id.* at 317 n. 9 (additional citation omitted).”

17 **ii. Whether Wells Fargo Is a Citizen of California**

18 In the absence of guidance from either the Supreme Court or the Ninth Circuit, district  
19 courts in the circuit have reached conflicting conclusions regarding the citizenship of national  
20 banks. Compare *Goodman v. Wells Fargo Bank, NA*, No. CV 11-2685 JFW (RZx), 2011 WL  
21 2372044, \*2 (C.D. Cal. June 1, 2011) (remanding after concluding that Wells Fargo was a citizen  
22 of California, where it has its principal place of business, and that its citizenship was not diverse  
23 from that of a California plaintiff); *Saberi v. Wells Fargo Home Mortg.*, No. 10CV1985 DMS  
24 (BGS), 2011 WL 197860, \*3 (S.D. Cal. Jan. 20, 2011) (“Accordingly, for purposes of diversity  
25 jurisdiction, Wells Fargo Bank is both a citizen of South Dakota, where it has designated its main  
26 office, and California, where it has its principal place of business”); *Mount v. Wells Fargo Bank,*  
27 *N.A.*, No. CV 08-6298 GAF (MANx), 2008 WL 5046286, \*2 (C.D. Cal. 2008) (holding that  
28 Wells Fargo is a citizen of the state where it has its principal place of business and the state where

its main office is located) with *Tse v. Wells Fargo Bank, N.A.*, No. C10-4441 TEH, 2011 WL 175520, \*2 (N.D. Cal. Jan. 19, 2011) (“[T]he test for a national bank’s citizenship under section 1348 is determined solely by the location of its main office designated in its articles of association”); *Cochran v. Wachovia Bank, N.A., et al.*, Case No. CV 10-018 CAS (AGRx), 2010 U.S. Dist. LEXIS 38379 (C.D. Cal. Mar. 9, 2010) (concluding that a national bank was a citizen only of the state in which its main office is located); *DeLeon v. Wells Fargo Bank, N.A.*, 729 F.Supp.2d 1119, 1124 (N.D.Cal. 2010) (“[T]he Court concludes that Wells Fargo is a citizen of the state in which its main office, as specified in its articles of association, is located”); *Kasramehr v. Wells Fargo Bank N.A. et al.*, CV 11-0551 GAF (OPx) at 3 (reconsidering the position taken in *Mount* and concluding that Wells Fargo is a citizen only of the state in which it has its main office); *Nguyen v. Wells Fargo Bank, N.A.*, 749 F.Supp.2d 1022, 1028 (N.D. Cal. 2010) (“Wells Fargo is a citizen of the state in which it has designated its ‘main office’”).

Courts concluding that Wells Fargo is a California citizen, including this one,<sup>115</sup> have been swayed by the fact that § 1348 was intended to place national banks “on the same footing as the banks of the state where they were located.” *Wachovia Bank*, 546 U.S. at 310. Focusing on Congressional intent, they have concluded that the citizenship of national banks should be coextensive with the citizenship of state banks. See *Horton v. Bank One, N.A.*, 387 F.3d 426, 431 (5th Cir. 2004) (“It follows that we should read section 1348 as retaining its objective of jurisdictional parity for national banks vis-à-vis state banks and corporations. . . . We are persuaded that this goal of jurisdictional parity is best served by interpreting ‘located’ as referring to a national bank’s principal place of business as well as the state specified in the bank’s articles

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<sup>115</sup>In a prior case, this court decided, in ruling on an *ex parte* application to remand, that Wells Fargo was a citizen of California. *Stewart v. Wachovia Mortg. Corp.*, No. CV 11-06108 MMM (AGRx), 2011 WL 3323115, \*6 (C.D. Cal. Aug. 2, 2011). In a later case, where the court had the benefit of fuller briefing, it reached the contrary conclusion. (See CV No. 11-05771 MMM (VBKx), Order Denying Plaintiff’s Motion to Remand, Granting Defendant’s Motion to Dismiss, Granting Defendant’s Motion to Expunge Lis Pendens, Denying Plaintiff’s Motion to File Supplemental Pleading to First Amended Complaint, Docket No. 19 (Nov. 1, 2011).)

1 of association”); *Mount*, 2008 WL 5046286 at \*2 (concluding that a national bank was a citizen  
2 of the state where its principal place of business was located because “this would place national  
3 banks on the same footing as any other corporation”); *Stewart*, 2011 WL 3323115 at \*5 (“Since  
4 Congress wished national banks to have the same access to federal courts as state-chartered banks,  
5 interpreting § 1348 so as to foreclose the possibility that a national bank is ‘located’ where it  
6 maintains its principal place of business would not further Congress’ purposes”).

7 In *Excelsior Funds, Inc. v. JP Morgan Chase Bank, N.A.*, 470 F.Supp.2d 312 (S.D.N.Y.  
8 2006), however, one court offered a compelling counter-argument refuting this reasoning.  
9 Recognizing Congress’s intent to create parity, the *Excelsior* court noted that at the time § 1348  
10 was enacted, a state bank was only a citizen of a single state: the state in which it was  
11 incorporated. *Id.* at 319. As a result, jurisdictional parity at the time the statute was passed was  
12 achieved by limiting a national bank’s citizenship to a single location. The concept that a  
13 corporation was a citizen of the state where it had its principal place of business did not arise until  
14 1958, when 28 U.S.C. § 1332(c)(1) was first enacted. See An Act of July 25, 1958, Pub.L. No.  
15 85-554, 72 Stat. 415; S.Rep. No. 85-1830 (1958), as reprinted in 1958 U.S.C.C.A.N. 3099,  
16 3101-02; *Excelsior*, 470 F.Supp.2d at 319. Reasoning that the most relevant time period for  
17 determining the meaning of a statute is the time it was enacted, the *Excelsior* court concluded that  
18 the citizenship of national banks did not remain permanently tethered to the citizenship of state  
19 banks, and that Congressional expansion of the state banks’ citizenship in 1958 did not result in  
20 a corresponding expansion of the citizenship of national banks. *Id.* (adding that “[i]f Congress  
21 intended to achieve jurisdictional parity between national and state banks for all time[ ] in § 1348,  
22 and thus to include principal place of business as a location for a national bank when it became  
23 a basis for citizenship for a state bank, Congress could have provided for that in the statutory  
24 language”). The court continued: “In fact, the language that expressly established parity between  
25 national banks and state banks was removed in 1887, when the language was changed to create  
26 jurisdictional parity between national banks and ‘individual citizens.’” *Id.* at 320. This suggests,  
27 the court concluded, that “the concept of jurisdictional parity underlying the statute is more  
28 limited, based on the then-existing understanding of citizenship, which would have been a single

1 state for either state banks or individual citizens.” *Id.*

2 The court finds this analysis persuasive.<sup>116</sup> While it recognizes that Congress’ original  
3 intent in adopting § 1348 was to achieve parity between state and national banks, one can only  
4 speculate as to what Congress’ intent would have been had it known that the citizenship of state  
5 banks would be changed decades in the future. At the time Congress attempted to create  
6 jurisdictional parity between state and national banks, state banks could be sued only where they  
7 were incorporated. The best analog to this location is the state designated in a national bank’s  
8 articles of association as the location of its main office. As a result, the court concludes that Wells  
9 Fargo is a citizen only of South Dakota, not California. Because Wells Fargo is not a California  
10 citizen, its citizenship is diverse from plaintiffs’.<sup>117</sup>

11  
12 <sup>116</sup>Plaintiffs’ reliance on *Horton v. Bank One, N.A.*, 387 F.3d 426, 436 (5th Cir. 2004),  
13 and *Firststar Bank, N.A. v. Faul*, 253 F.3d 982, 984 (7th Cir. 2001), is misplaced. While those  
14 cases contained language suggesting that a national banking association may be a citizen both of  
15 its state of incorporation and the state of its principal place of business, the holdings in *Horton* and  
16 *Firststar* addressed whether a national bank is a citizen of every state in which it operates a branch.  
As noted, the Supreme Court decided that issue in *Wachovia*, and the Seventh Circuit subsequently  
revisited its earlier holding in *Hicklin Engineering, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir.  
2006), concluding that banks were not citizens of all states where they had branches.

17 <sup>117</sup>In their opposition, plaintiffs contend that Wells Fargo has “judicially admitted” that its  
18 principal place of business is California. Plaintiffs cite two district court cases in which Wells  
19 Fargo alleged in its complaint that its principal place of business was in California. See *Wells*  
20 *Fargo Bank, N.A. v. Siegel*, No. 05 C 5635, 2005 WL 3482236, \*2 (N.D. Ill. Dec. 15, 2005);  
21 *Jojola v. Wells Fargo Bank*, No. C71-900 SAW, 1973 WL 158166, \*1 (N.D. Cal. May 2, 1973).  
Assuming Wells Fargo admitted that fact, the admission is irrelevant for purposes of determining  
whether its citizenship, as the analysis set forth above indicates.

22 Plaintiffs appear, moreover, to be invoking the doctrine of judicial *estoppel*, rather than  
23 judicial *admission*. Under the doctrine of judicial estoppel, “‘absent any good explanation, a party  
24 should not be allowed to gain an advantage by litigation on one theory, and then seek an  
25 inconsistent advantage by pursuing an incompatible theory.’” *New Hampshire v. Maine*, 532 U.S.  
26 742, 749 (2001). “[F]ederal law governs the application of judicial estoppel in federal court.”  
27 *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 603 (9th Cir. 1996). The doctrine  
28 applies to positions taken in the same or different actions. See *id.* at 605 (“We now make it  
explicit that the doctrine of judicial estoppel is not confined to inconsistent positions taken in the  
same litigation”). It also “applies to a party’s stated position whether it is an expression of  
intention, a statement of fact, or a legal assertion.” *Wagner v. Professional Engineers in*  
*California Government*, 354 F.3d 1036, 1044 (9th Cir. 2004) (citing *Helfand v. Gerson*, 105 F.3d

1                                    **iii.     Whether Cal-Western Has Been Fraudulently Joined**

2            The complaint also pleads claims against Cal-Western, which is allegedly a California  
3 citizen.<sup>118</sup> Defendants assert that Cal-Western is fraudulently joined, and therefore should be

4  
5  
6 530, 535 (9th Cir. 1997)). Judicial estoppel leads to a determination on the merits that a party  
7 cannot assert a position inconsistent with one taken in prior litigation. See, e.g., *Elston v.*  
8 *Westport Ins. Co.*, No. 05-16728, 2007 WL 3268429, \*2 (9th Cir. Nov. 6, 2007) (Unpub. Disp.)  
(affirming the district court's entry of summary judgment against the plaintiff on the basis that her  
claims were barred by judicial estoppel).

9            Factors relevant in deciding whether to apply the doctrine include: (1) whether a party's  
10 later position is "clearly inconsistent" with its earlier position; (2) whether the party has  
11 successfully advanced the earlier position, such that judicial acceptance of an inconsistent position  
12 in the later proceeding would create a perception that either the first or the second court had been  
13 misled; and (3) "whether the party seeking to assert an inconsistent position would derive an  
14 unfair advantage or impose an unfair detriment on the opposing party if not estopped." *New*  
15 *Hampshire*, 532 U.S. at 751 (citations omitted). In addition to these factors, the Ninth Circuit  
examines "whether the party to be estopped acted inadvertently or with any degree of intent." *EaglePicher Inc. v. Federal Ins. Co.*, CV 04-870 PHX MHM, 2007 WL 2265659, \*3 (D. Ariz. Aug. 6, 2007) (citing *Johnson v. Oregon Dep't of Human Resources Rehab. Div.*, 141 F.3d 1361, 1369 (9th Cir. 1998)).

16            To invoke judicial estoppel, plaintiffs would have to demonstrate that Wells Fargo has  
17 argued that it is a citizen both of the state in which it has its principal place of business and the  
18 state in which its main office is located. They would also have to show that those courts relied  
19 on Wells Fargo's arguments in determining that they either had or lacked jurisdiction. Plaintiffs  
20 have adduced no evidence that either factor is true, as the cited cases and pleadings state only that  
21 Wells Fargo alleged that its principal place of business was in California. In *Siegel*, for example,  
the district court stated that Wells Fargo's complaint alleged that its principal place of business  
22 was in California and that its operational center was South Dakota. 2005 WL 3482236 at \*2. The  
23 court interpreted the allegations as asserting that Wells Fargo was "a citizen of both California and  
South Dakota." *Id.* Putting aside whether Wells Fargo intended to represent that it was a citizen  
24 of both states for jurisdictional purposes, the crucial issue in *Siegel* was the same one the Supreme  
Court addressed in *Wachovia*, i.e., whether a national banking association was a citizen of any  
25 state where it had a branch. *Id.* The *Siegel* court thus had no occasion to determine whether  
26 Wells Fargo was a citizen of the state where it had its principal place of business. Plaintiffs have  
adduced no evidence either that Wells Fargo has argued that it is a citizen of the state in which it  
27 has its principal place of business nor that a court relied on such an argument in reaching a result  
favorable to Wells Fargo. It has adduced evidence only that Wells Fargo has alleged that its  
principal place of business is in California. Wells Fargo has not denied this fact in this litigation,  
and as noted, it is not relevant in determining its citizenship for jurisdictional purposes.

28            <sup>118</sup>Complaint, ¶ 162.

disregarded for the purposes of determining complete diversity.<sup>119</sup>

“It is a commonplace that fraudulently joined defendants will not defeat removal on diversity grounds.” *Ritchey v. Upjohn Drug Co.*, 139 F.3d 1313, 1318 (9th Cir. 1998) (citing *Emrich*, 846 F.2d at 1193 & n. 1 and *McCabe v. General Foods Corp.*, 811 F.2d 1336, 1339 (9th Cir.1987)). A non-diverse defendant is fraudulently joined and its citizenship is disregarded “[i]f the plaintiff fails to state a cause of action against the [non-diverse] defendant, and the failure is obvious according to the settled rules of the state. . . .” *Hamilton Materials, Inc. v. Dow Chemical Co.*, 494 F.3d 1203, 1206 (9th Cir. 2007) (quoting *McCabe*, 811 F.2d at 1339). “Fraudulent joinder must be proven by clear and convincing evidence.” *Id.* (citing *Pampillon v. RJR Nabisco, Inc.*, 138 F.3d 459, 461 (2d Cir.1998)). Because courts must resolve all doubts against removal, a court determining whether joinder is fraudulent “must resolve all material ambiguities in state law in [the] plaintiff’s favor.” *Macey v. Allstate Property and Cas. Ins. Co.*, 220 F.Supp.2d 1116, 1117 (N.D. Cal. 2002) (citing *Good v. Prudential*, 5 F.Supp.2d 804, 807 (N.D.Cal.1998)). Thus, “[i]f there is a non-fanciful possibility that plaintiff can state a claim under [state] law against the non-diverse defendants[,] the court must remand.” *Id.*

“If the plaintiff fails to state a cause of action against a resident defendant, and the failure is obvious according to the settled rules of the state, the joinder of the resident defendant is fraudulent. . . . Where fraudulent joinder is an issue, . . . [t]he defendant seeking removal to the federal court is entitled to present the facts showing the joinder to be fraudulent.” *Ritchey*, 139 F.3d at 1318 (citations omitted). Demonstrating fraudulent joinder, however, requires more than merely showing that plaintiff has failed to state a claim for relief. See *Latino v. Wells Fargo Bank, N.A.*, No. 2:11-cv-02037-MCE-DAD, 2011 WL 4928880, \*3 (E.D. Cal. Oct. 17, 2011) (“[W]hile Removing Defendants may believe Plaintiff cannot state a claim against Cal-Western, they have failed to show that Cal-Western has been joined in a merely nominal capacity”). “In the Ninth Circuit, a non-diverse defendant is deemed to be fraudulently joined if, after all disputed questions of fact and all ambiguities in the controlling state law are resolved in the plaintiff’s

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<sup>119</sup>Removal, ¶ 31.



1 favor, the plaintiff *could not possibly recover* against the party whose joinder is questioned.” *Sun*  
2 *v. Bank of America Corp.*, No. SACV 10-0004 AG (MLGx), 2010 WL 454720, \*3 (C.D.Cal.  
3 Feb. 8, 2010) (emphasis added, citing *Kruso v. Int’l Tel. & Tel. Corp.*, 872 F.2d 1416, 1426 (9th  
4 Cir.1989)). Defendants must show that the relevant state law is so well settled that plaintiff  
5 “would not be afforded leave to amend his complaint to cure th[e] purported deficiency.” *Burris*  
6 *v. AT&T Wireless, Inc.*, No. C 06-02904 JSW, 2006 WL 2038040, \*2 (N.D. Cal. Jul. 19, 2006);  
7 *Nickelberry v. DaimlerChrysler Corp.*, No. C-06-1002 MMC, 2006 WL 997391, \*1 (N.D. Cal.  
8 Apr. 17, 2006) (“DCC has failed to show that, under California law, Nickelberry would not be  
9 afforded leave to amend her complaint to address the purported pleading deficiency on which DCC  
10 relies”).

11 Defendants argue that plaintiffs refer to Cal-Western only once in their 84-page complaint.  
12 That allegation does nothing more than refer to Cal-Western’s citizenship.<sup>120</sup> Defendants adduce  
13 evidence that Cal-Western “[was] merely the trustee of the deeds of trust,” and that “its  
14 contractual duties [were] limited by state law.”<sup>121</sup> Because of the dearth of factual allegations  
15 concerning Cal-Western, and the limited nature of its role as trustee, defendants assert that it  
16 cannot be held liable on any of plaintiffs’ claims, and that it was fraudulently joined as a result.

17 The sufficiency of plaintiffs’ current allegations against Cal-Western is questionable, given

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19 <sup>120</sup>Complaint, ¶ 162.

20 <sup>121</sup>Removal, ¶ 33; Declaration of Drew A. Robertson in Support of Defendant’s Notice of  
21 Removal (“Robertson Decl.”), Docket No. 3 (Sept. 16, 2011), Exh. A (Declaration of Non-  
22 Monetary Status by Cal-Western (“Cal-Western Decl.”), ¶¶ 3-5 (stating the company’s belief that  
23 it was named in the lawsuit solely in its capacity as trustee, and not due to wrongful acts or  
24 omissions arising out of its performance as trustee). Under California law, when a trustee has  
25 been named in an action solely in its capacity as trustee, it may file a declaration of “non-monetary  
26 status.” If no party opposes the declaration within fifteen days, the trustee is not required to  
27 participate in the action, and is not liable for damages or costs awarded in the action. See CAL.  
28 CIV. CODE 2924; *Couture v. Wells Fargo Bank, N.A.*, No. 11-CV-1096-IEG (CAB), 2011 WL  
3489955, \*3 n. 2 (S.D. Cal. Aug. 9, 2011). Cal-Western filed a declaration of non-monetary  
status in state court on September 2, 2011. (Cal-Western Decl. at 1.) Plaintiffs filed objection  
to the declaration on September 16, 2011, the same date defendants removed the action to federal  
court. (Request for Judicial Notice in Support of Motion to Remand (“Remand RJN”), Docket  
No. 14 (Oct. 14, 2011).)

1 that the only specific reference to Cal-Western in the complaint concerns its citizenship, and given  
2 that plaintiffs make frequent use throughout the complaint of the plural “defendants,” failing to  
3 specify which particular defendant or defendants were involved in the allegedly unlawful conduct.  
4 The complaint does assert, however, that all defendants were engaged in a conspiracy to defraud  
5 plaintiffs and that they are jointly and severally liable with one another as a result.<sup>122</sup> “Conspiracy  
6 is not a cause of action, but a legal doctrine that imposes liability on persons who, although not  
7 actually committing a tort themselves, share with the immediate tortfeasors a common plan or  
8 design in its perpetration.” *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.*, 7 Cal.4th 503,  
9 510-11 (1994). “By participation in a civil conspiracy, a coconspirator effectively adopts as his  
10 or her own the torts of other coconspirators within the ambit of the conspiracy.” *Id.* at 511 (citing  
11 *Wyatt v. Union Mortgage Co.*, 24 Cal.3d 773, 784 (1979). “In this way, a coconspirator incurs  
12 tort liability co-equal with the immediate tortfeasors.” *Id.* See also *Vieux v. East Bay Regional*  
13 *Park District*, 906 F.3d 1330, 1343 (9th Cir. 1990) (“A civil conspiracy is a combination ‘of two  
14 or more persons who, by some concerted action, intend to accomplish some unlawful objective  
15 for the purpose of harming another which results in damage’”); *Transgo, Inc. v. Ajac*  
16 *Transmission Parts Corp.*, 768 F.2d 1001, 1020 (9th Cir. 1985) (stating that to prove civil  
17 conspiracy, the alleged conspirators must have reached “a unity of purpose or a common design  
18 and understanding, or a meeting of the minds in an unlawful arrangement”), cert. denied, 474  
19 U.S. 1059 (1986).

20 Although the court does not presently decide the sufficiency of plaintiffs’ conspiracy  
21 allegations, it does note that under a conspiracy theory, all defendants could be held responsible  
22 for the acts of their co-conspirators, so long as those acts were undertaken in furtherance of the  
23 conspiracy. As a result, it is untrue that the complaint lacks allegations that could result in Cal-  
24 Western being held liable for the wrongful conduct charged.<sup>123</sup>

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26 <sup>122</sup>Complaint, ¶¶ 164-69.

27 <sup>123</sup>The court is mindful of the rule articulated by the California Supreme Court in *Doctors’*  
28 *Co. v. Superior Court*, 49 Cal.3d 39, 44 (1989), and *Applied Equipment Corp. v. Litton Saudi*



Defendants contend, however, that as a trustee, Cal-Western is immunized as a matter of law from liability on tort causes of action. “[A] trustee’s actions in executing a non-judicial foreclosure are privileged communications under Cal. Civ. Code section 47, and as such will not support a tort claim other than one for malicious prosecution.” *Champlaie v. BAC Home Loans Servicing, LP*, 706 F.Supp.2d 1029, 1062 (E.D.Cal. 2009) (citing CAL. CIV. CODE §§ 47, 2924(d) and *Kachlon v. Markowitz*, 168 Cal.App.4th 316, 333, (2008)); see also *Canales v. Federal Home Loan Mortg. Corp.*, No. CV 11-2819 PSG (VBKx), 2011 WL 3320478, \*3 (C.D.Cal. Aug. 1, 2011) (“California law clearly provides that a trustee’s actions in executing a non-judicial foreclosure are privileged communications under Cal. Civ. Code § 47 and will not support a tort claim other than one for malicious prosecution, which is not alleged here”); *Sherman v. Wells Fargo Bank, N.A.*, No. CIV S-11-0054 KJM EFB, 2011 WL 1833090, \*2-3 (E.D. Cal. May 12, 2011) (“In California, the trustee’s duties are limited to those imposed by statute and by the contract, namely to foreclose upon default and to reconvey the deed of trust upon satisfaction of the secured debt; the trustee does not act as a fiduciary, but rather as common agent for the trustor and beneficiary of the deed of trust. The underlying complaint does not allege that Cal Western violated any statutory or contractual duties it owed to plaintiffs” and thus, “the court finds that Cal-Western was fraudulently joined for diversity purposes”).

Most of plaintiffs’ claims sound in tort, making them subject to California Civil Code 47.<sup>124</sup>

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*Arabia Ltd.*, 7 Cal.4th 503, 514 (1994), that a party cannot be held liable for conspiracy unless it was “personally bound by the duty violated by the wrongdoing. . . .” *Doctors’ Co.*, 49 Cal.3d at 44; see also *Applied Equipment*, 7 Cal.4th at 514 (“[Conspiracy] allows tort recovery only against a party who already owes the duty and is not immune from liability based on applicable substantive tort law principles”). Here, Cal-Western owed an independent duty not to engage in fraud or make misrepresentations.

<sup>124</sup>Plaintiffs appear to concede that their fraudulent concealment, intentional misrepresentation, and negligent misrepresentation claims are tort causes of action that, to the extent asserted against Cal-Western, are barred by Civil Code § 47. Their reply, in fact, offers no argument regarding these claims. (Reply at 21-22.) Similarly, plaintiffs’ breach of contract claim does not allege that plaintiffs had a contract with Cal-Western; their reply does not address the issue. As the existence of a contract is one of the elements of a breach of contract claim, it appears that this claim cannot proceed against Cal-Western. See *Appling v. Wachovia Mortgage*,

1 The privilege of a trustee is not absolute, however. As the California Court of Appeal explained,  
2 “The overall balance of interests reflected in the statutory scheme, however, favors  
3 protection of trustors’ property rights, thus suggesting that trustors should not be  
4 entirely deprived of the ability to vindicate their property rights if wrongfully  
5 violated by the trustee. Granting absolute immunity from such wrongdoing would  
6 wholly sacrifice the trustor’s interest in favor of the trustee. The qualified common  
7 interest privilege, on the other hand, would provide a significant level of protection  
8 to trustees, leaving them open to liability only if they act with malice. At the same  
9 time, it preserves the ability of trustors to protect against the wrongful loss of  
10 property caused by a trustee’s malicious acts.” *Kachlon*, 168 Cal.App.4th at 340.

11 Plaintiffs’ wrongful foreclosure claim alleges that “[d]efendants acted outrageously and  
12 persistently with actual malice in performing the acts alleged in this cause of action.”<sup>125</sup> While  
13 the allegations concerning actual malice are thin, “[m]alice . . . may be alleged generally.”  
14 FED.R.CIV.PROC. 9(b). Plaintiffs’ assertion that defendants, including Cal-Western, acted with  
15 actual malice suggests that Cal-Western’s actions were not privileged, and it is not immune from  
16 suit, as a matter of law. See *Ritchey*, 139 F.3d at 1318 (noting that in order to demonstrate that  
17 defendants were fraudulently joined, defendants had to show that “the individuals joined in the  
18 action cannot be liable on any theory”); see also *Couture*, 2011 WL 3489955 at \*3 (rejecting  
19 Wells Fargo’s argument that “Cal-Western is a nominal party because (1) it is ‘merely the  
20 foreclosure trustee,’ and (2) ‘there are no substantive allegations against Cal-Western,’” quoting  
21 the notice of removal)); cf. *Silva v. Wells Fargo Bank, NA*, No. CV 11-3200 GAF (JCGx), 2011  
22 WL 2437514, \*5 (C.D. Cal. June 16, 2011) (“Removing Defendants might argue that  
23 Cal-Western is immune from liability for these actions under California Civil Code section 2924,  
24 which immunizes trustees from liability for claims in connection with executing a nonjudicial  
25 foreclosure. . . . [I]t is unclear whether this argument would prevail in any event: It is unclear

26 \_\_\_\_\_  
27 *FSB*, 745 F.Supp.2d 961, 974 (N.D. Cal. 2010).

28 <sup>125</sup>Complaint, ¶ 375.

whether these provisions would also apply where, as here, the plaintiff alleges that the foreclosing trustee was not actually the trustee authorized to initiate non-judicial foreclosure proceedings”). Consequently, the court cannot say that there is no possibility that plaintiffs can state a claim against Cal-Western.<sup>126</sup>

Defendants also argue that plaintiffs’ UCL claim fails because plaintiffs lack standing to assert such a claim. See *Daro v. Superior Court*, 151 Cal.App.4th 1079, 1097-98 (2007) (explaining that Proposition 64 modified the UCL’s standing requirement “to provide that a private person has standing to sue only if he or she ‘has suffered injury in fact and has lost money or

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<sup>126</sup>Given this conclusion, the court declines to address defendants’ arguments regarding the sufficiency of the wrongful foreclosure allegations. Defendants correctly assert, however, that plaintiffs’ wrongful foreclosure claim fails to the extent it is based on a theory that the foreclosing party must possess the original note to initiate a non-judicial foreclosure sale. See, e.g., *Maguca v. Aurora Loan Serv.*, CV No. 09-1086 JVS (ANx), 2009 WL 3467750, \*3 (C.D. Cal. Oct. 28, 2009) (“Under California Civil Code section 2924, ‘no party needs to physically possess the promissory note.’ Rather, ‘[t]he foreclosure process is commenced by the recording of a notice of default and election to sell by the trustee.’ . . . A ‘person authorized to record the notice of default or the notice of sale’ includes ‘an agent for the mortgagee or beneficiary, an agent of the named trustee, any person designated in an executed substitution of trustee, or an agent of that substituted trustee’” (internal citations omitted)); *Sicairos v. NDEX West, LLC*, CV No. 08-2014 LAB (BLM), 2009 WL 385855, \*3 (S.D. Cal. Feb. 13, 2009) (“Under Civil Code section 2924, no party needs to physically possess the promissory note. See Cal. Civ. Code § 2924(a)(1). Rather, “[t]he foreclosure process is commenced by the recording of a notice of default and election to sell by the trustee,” citing *Moeller v. Lien*, 25 Cal.App.4th 822, 830 (1994)); *Puttkuri v. Recontrust Co.*, CV No. 08-1919 WQH (AJB), 2009 WL 32567, \*2 (S.D. Cal. Jan. 5, 2009) (“Pursuant to section 2924(a)(1) of the California Civil Code, the trustee of a Deed of Trust has the right to initiate the foreclosure process. CAL. CIV. CODE § 2924(a). Production of the original note is not required to proceed with a non-judicial foreclosure”).

Plaintiffs counter that their wrongful foreclosure claim is not based on the fact that defendants failed physically to produce the note, but on the fact that defendants are not the lawful holders of the note. (Complaint, ¶¶ 369, 373.) In their opposition, plaintiffs cite *Kelley v. Upshaw*, 39 Cal.2d 179 (1952), for the proposition that “assignment of the mortgage without an assignment of the debt which is secured [is] a legal nullity.” *Id.* at 192. This citation suggests that plaintiffs contend the deeds of trust were improperly assigned.

This assertion appears inconsistent with factual allegations that defendants fraudulently induced plaintiffs to enter into mortgage agreements with them. The mass of allegations in the complaint, however, makes it difficult to ascertain the theory underlying the wrongful foreclosure claim, and amendment may cure any deficiencies that exist.

1 property as a result of such unfair competition,” quoting CAL. BUS. & PROF. CODE § 17204)).  
2 “In order to have standing to sue under section 17204, it is not enough for a private person to have  
3 suffered an injury in fact. . . . [A] private person has no standing under the UCL unless that  
4 person can establish that the injury suffered and the loss of property or money resulted from  
5 conduct that fits within one of the categories of ‘unfair competition’ in section 17200.” *Id.*

6 Defendants rely heavily on the California Court of Appeal’s decision in *Bank of America*  
7 *Corp. v. Superior Court*, 198 Cal.App.4th 862 (2007), where plaintiffs pled a fraudulent  
8 misrepresentation claim based on an allegation that “defendants failed to disclose to  
9 plaintiffs/borrowers that defendants ‘knowingly pooled their secretly risky loans into pools they  
10 sold above fair value, defrauding their investors.’” They also asserted that “[t]he ‘unraveling of  
11 the Defendants’ fraudulent scheme ha[d] materially depressed the price of real estate throughout  
12 California, including the real estate owned by Plaintiffs[.]” *Id.* at 871. Plaintiffs disavowed any  
13 suggestion that they alleged the loans they had received were unaffordable or the loan disclosures  
14 fraudulent. *Id.* Therefore, their claim was based on defendants’ lax underwriting practices and  
15 scheme to inflate property values throughout California, on their pooling of mortgages and their  
16 sale of the pooled mortgages to unsuspecting investors. *Id.* The *Bank of America* court concluded  
17 that plaintiffs had failed adequately to plead a causal nexus between defendants’ conduct and their  
18 alleged injury, which was the reduction in the value of their homes, their lack of access to equity  
19 lines of credit, and their reduced credit scores. The court held that “[t]he defect in [plaintiffs’]  
20 allegation [was] that homeowners who did not obtain loans from Countrywide likewise suffered  
21 a decline in property values, a decline in their home equity, and reduced access to their home  
22 equity lines of credit. . . . [A]ll suffered a loss of home equity due to the generalized decline in  
23 home values.” *Id.* Consequently, the court concluded that plaintiffs could demonstrate “no nexus  
24 between the alleged fraudulent concealment by Countrywide and the economic harm which these  
25 plaintiffs/borrowers have suffered.” *Id.*

26 Defendants contend that *Bank of America* controls, since plaintiffs are proceeding on a  
27 similar theory. The court disagrees. First, plaintiffs’ UCL claim pleads different forms of injury.  
28 Plaintiffs allege that they have experienced “reduced credit scores, unavailability of credit,

1 increased costs of credit, reduced availability of goods and services tied to credit ratings . . . [and  
2 incurred] attorneys’ fees and costs,”<sup>127</sup> as well as other “monetary and property loss,” including  
3 “loss of some or all of the benefits appurtenant to the ownership and possession of real  
4 property.”<sup>128</sup> Plaintiffs, however, cannot recover damages under the UCL. See *Kaldenbach v.*  
5 *Mutual of Omaha Life Ins. Co.*, 178 Cal.App.4th 830, 847 (2009) (“Although a private citizen  
6 can sue under the UCL, only equitable remedies are available (e.g., injunction, restitution), and  
7 damages are not an available remedy”). The relevant question, therefore, is the nature of the  
8 restitution plaintiffs seek. Here, plaintiffs allege that they are entitled to recoup “interest payments  
9 made by Plaintiffs, fees paid to Defendants, including . . . the excessive fees paid at Defendants’  
10 direction . . . , and premiums received upon selling the mortgages at an inflated value.”<sup>129</sup>  
11 Plaintiffs also seek injunctive relief to prevent defendants from violating the numerous statutes on  
12 which they UCL claim is allegedly based. Unlike the type of relief sought in *Bank of America*,  
13 the restitution plaintiffs seek is directly tied to the fact that they obtained mortgages from  
14 defendants.

15 The *Bank of America* court, moreover, “emphasiz[ed] the limited nature of [its] holding,”  
16 which was only that plaintiffs had failed to state a cause of action for fraudulent concealment  
17 because they had not adequately pled duty or causation. *Id.* at 873. Defendants’ attempt to use  
18 this limited holding to argue that plaintiffs lack standing under UCL fails. Plaintiffs have clearly  
19 alleged that they “suffered injury in fact and . . . lost money or property as a result of [defendants’  
20 purported acts of] unfair competition.” CAL. BUS. & PROF. CODE § 17204. They have thus  
21 sufficiently pled that they have standing to sue under the UCL. See *Nelson v. Pearson Ford Co.*,  
22 186 Cal.App.4th 983, 1014 (2010) (“The actual payment of money by a plaintiff, as wrongfully  
23 required by a defendant, ‘constitute[s] an ‘injury in fact’ for purposes of Business and Professions  
24 Code section 17204,’” quoting *Troyk v. Farmers Group, Inc.*, 171 Cal.App.4th 1305, 1347

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26 <sup>127</sup>Complaint, ¶ 355.

27 <sup>128</sup>*Id.*, ¶ 358.

28 <sup>129</sup>*Id.*, ¶ 360.

(2009); see also *Pinel v. Aurora Loan Services, LLC*, \_\_ F.Supp.2d \_\_, 2011 WL 3843960, \*9 (N.D. Cal. Aug. 30, 2011) (“A plaintiff suffers an injury in fact for purposes of prudential standing under the UCL when he or she has: (1) expended money due to the defendant’s acts of unfair competition (2) lost money or property or (3) been denied money to which he or she has a cognizable claim”); cf. *In re Tobacco II Cases*, 46 Cal.4th 298, 306 (2009) (holding that while UCL fraud prong should be construed in concordance with “well-settled principles regarding the element of reliance in ordinary fraud actions,” those principles “do not require the class representative to plead or prove an unrealistic degree of specificity that the plaintiff relied on particular advertisements or statements when the unfair practice is a fraudulent advertising campaign”).

Defendants also complain that certain of the statutes on which plaintiffs’ UCL claim is based do not support the cause of action. Specifically, they contend that plaintiffs’ citation of California Civil Code § 2923.5 is insufficient,<sup>130</sup> since the only remedy for a violation of § 2923.5 is a delay of the foreclosure sale, not the vacating of a completed sale. See *Mabry v. Superior Court*, 185 Cal.App.4th 208, 235 (2010) (“We would merely note that under the plain language of section 2923.5, read in conjunction with section 2924g, the only remedy provided is a postponement of the sale before it happens”). While it appears that the properties of the plaintiffs asserting a wrongful foreclosure claim have already been sold, the fact that the sales violated § 2923.5, if they did, may satisfy the “unlawful” prong of the UCL, and provide plaintiffs a right to restitutionary relief. See *Latino v. Wells Fargo Bank, N.A.*, No. 2:11-cv-02037-MCE-DAD, 2011 WL 4928880, \*5 (E.D. Cal. Oct. 17, 2011) (“Removing Defendants therefore bear the burden of showing that it is both ‘well-settled’ and ‘obvious’ that Plaintiff cannot possibly state a claim against Cal-Western. . . . Defendants ignore, among other things, Plaintiff’s allegations that all Defendants, including Cal-Western, participated in a massive scheme intended to defraud Plaintiff out of his Property and that Defendants, among other things, failed to adhere to the

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<sup>130</sup>Complaint, ¶¶ 350-51. The UCL claim also relies on violations of TILA, the USA Patriot Act, the Fair Credit Reporting Act, the California Financial Information Privacy Act, and other constitutional and statutory provisions.



1 requirements of California Civil Code § 2923.5 in foreclosing on the Property, thus resulting in  
2 a violation of California Business and Professions Code § 17200. Accordingly, this Court finds  
3 Removing Defendants have failed to meet their burden of showing there is no possibility Plaintiff  
4 could establish a cause of action against Cal-Western, and thus, the Court finds no fraudulent  
5 joinder”).

6 Consequently, defendants have not met their burden of demonstrating that Cal-Western was  
7 fraudulently joined in this action. They have, as a consequence, failed to show that there is  
8 complete diversity of citizenship between plaintiffs and defendants.

9 **b. Whether Defendants Have Met Their Burden of**  
10 **Demonstrating Amount in Controversy**

11 Diversity jurisdiction is lacking for another reason as well, i.e., that defendants have failed  
12 to demonstrate that the amount in controversy on each plaintiff’s claims exceeds \$75,000. As  
13 noted, when a complaint is silent regarding the amount in controversy, defendants bear the burden  
14 of proving, by a preponderance of the evidence, that the jurisdictional threshold is met. See, e.g.,  
15 *Lowdermilk*, 479 F.3d at 997 (“[W]hen the plaintiff fails to plead a specific amount of damages,  
16 the defendant seeking removal ‘must prove by a preponderance of the evidence that the amount  
17 in controversy requirement has been met,’” quoting *Abrego Abrego*, 443 F.3d at 683); *Matheson*,  
18 319 F.3d at 1090 (“Where it is not facially evident from the complaint that more than \$75,000 is  
19 in controversy, the removing party must prove, by a preponderance of the evidence, that the  
20 amount in controversy meets the jurisdictional threshold”). In addition to the notice of removal,  
21 the court considers “‘summary-judgment-type evidence relevant to the amount in controversy at  
22 the time of removal,’” such as affidavits or declarations. *Valdez v. Allstate Insurance Co.*, 372  
23 F.3d 1115, 1117 (9th Cir. 2004) (citation omitted).

24 As noted, plaintiffs’ complaint is ambiguous regarding the amount in controversy in this  
25 litigation. They plead only that “fewer than 100” plaintiffs allege an amount in controversy equal  
26 to or *above* the jurisdictional threshold of \$75,000. This allegation does not specify the amount  
27 in controversy on the claims of any individual plaintiff. Nor, because it states that certain claims  
28 equal or exceed \$75,000, does it affirmatively limit the claim of any plaintiff to an amount below



1 the jurisdictional threshold of \$75,000. Additionally, “fewer than 100” could mean that no  
2 plaintiff alleges an amount in controversy above the jurisdictional threshold, or that 99 do. Thus,  
3 defendants must show that the amount in controversy requirement is met by a preponderance of  
4 the evidence.

5 The court previously addressed the deficiencies in defendants’ amount in controversy  
6 arguments regarding CAFA mass action jurisdiction in Part II.A.3.a, *supra*. Similar problems  
7 bedevil their amount in controversy arguments regarding diversity jurisdiction. Once again, the  
8 only evidence defendants proffer is the Dolan declaration, which does not address the claims of  
9 eleven of the 108 plaintiffs. As to those individuals, therefore, defendants have adduced no  
10 evidence regarding the amount in controversy on their claims. As respects the remaining  
11 plaintiffs, Dolan states only that each “has, or at one time had, a mortgage loan with an  
12 outstanding principal balance in excess of \$75,000.”<sup>131</sup> For the reasons outlined earlier,  
13 defendants’ assumption that all plaintiffs have placed the full value of their mortgages at issue is  
14 mistaken.

15 The only plaintiffs who have arguably placed the full value of their mortgage at issue are  
16 those who plead claims for wrongful foreclosure and breach of contract, i.e., those named in the  
17 fifth and sixth causes of action. The Dolan declaration provides information only for nine of the  
18 plaintiffs who have asserted a wrongful foreclosure claim; it provides no information concerning  
19 any plaintiff who asserts a breach of contract claim.<sup>132</sup> The deficiencies that caused the court to  
20 conclude that defendants had not proved the amount in controversy for purposes of CAFA mass  
21 action provisions compel the same conclusion with respect to defendants’ assertion that there is  
22 diversity jurisdiction.

23 It is true that “[i]n actions seeking declaratory or injunctive relief, . . . the amount in  
24 controversy is measured by the value of the object of the litigation.” *Hunt v. Washington State*  
25 *Apple Advertising Com’n*, 432 U.S. 333, 346-47 (1977). See also *Chapman v. Deutsche Bank*

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26  
27 <sup>131</sup>Dolan Decl., ¶ 12.

28 <sup>132</sup>*Id.*

1 *Nat. Trust Co.*, 651 F.3d 1039, 1045 n. 2 (9th Cir. 2011) (“Here, the object in litigation is the  
2 Property, which was assessed at a value of more than \$200,000, and therefore satisfies the  
3 amount-in-controversy requirement”); *Garfinkle v. Wells Fargo Bank*, 483 F.2d 1074, 1076 (9th  
4 Cir. 1973) (treating the value of real property as the amount in controversy in an action to enjoin  
5 a foreclosure sale).

6 The Dolan declaration, however, provides no information regarding the value of any  
7 plaintiff’s property or, indeed, the size of loan obtained by any plaintiff who has asserted a  
8 wrongful foreclosure claim. It states only that “at the time of those foreclosures, each loan had  
9 an unpaid principal balance in excess of \$75,000.”<sup>133</sup> Dolan does not provide any documentation  
10 regarding loan amounts or property values. While the preponderance standard is not overly  
11 demanding, defendants must make a greater showing than the meager evidence they have provided  
12 here.<sup>134</sup>

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13  
14 <sup>133</sup>*Id.*

15 <sup>134</sup>Given the court’s conclusion, it need not address defendants’ arguments that if the court  
16 has jurisdiction over the claims of the individuals who assert the fifth and sixth causes of action,  
17 it can exercise supplemental jurisdiction over the claims of the remaining plaintiffs under 28  
18 U.S.C. § 1367(a). The court notes, however, that exercising supplemental jurisdiction as  
defendants suggest would be unwarranted.

19 When a federal claim is joined with state claims in the same action, the federal court has  
20 “supplemental jurisdiction over all other claims that are so related to [the federal] claim[ ] . . . that  
21 they form part of the same case or controversy under Article III of the United States  
22 Constitution.” 28 U.S.C. § 1367(a). If “a plaintiff’s claims are such that he would ordinarily be  
expected to try them all in one judicial proceeding, then, assuming substantiality of the federal  
issues, there is power in federal courts to hear the whole.” *United Mine Workers v. Gibbs*, 383  
U.S. 715, 725 (1966).

23 Having the court exercise supplemental jurisdiction is not a matter of right, however. See  
24 *Gibbs*, 383 U.S. at 725. 18 U.S.C. § 1367(c) identifies four reasons why a district court may  
choose to decline supplemental jurisdiction:

25 “(1) the claim raises a novel or complex issue of State law, (2) the claim  
26 substantially predominates over the claim or claims over which the district court has  
27 original jurisdiction, (3) the district court has dismissed all claims over which it has  
original jurisdiction, or (4) in exceptional circumstances, there are other compelling  
reasons for declining jurisdiction. . . .”

28 *Gibbs* noted that “if it appears that the state issues substantially predominate, whether in terms of

1 Finally, defendants' reliance on allegations in the complaint is unavailing. The complaint  
2 alleges claims on behalf of 108 plaintiffs. It pleads that "fewer than 100 plaintiffs are alleging  
3 claims or amounts in controversy that would, as to them[,], equal or exceed the jurisdictional  
4 amount for federal jurisdiction under 28 U.S.C. § 1332(a)."<sup>135</sup> Defendants assert the reference  
5 to "fewer than 100 plaintiffs" means that at least *some* unspecified number of plaintiffs assert  
6 claims above the jurisdictional amount. The court disagrees. First, because the allegation states  
7 that "fewer than 100 plaintiffs" allege an amount in controversy that "equal[s] or exceed[s]"  
8 \$75,000, it is unclear how many of the "fewer than 100 plaintiffs" actually satisfy the amount in  
9 controversy requirement. To the extent their claims "equal" \$75,000, they do not allege an  
10 amount in controversy that is sufficient to give rise to diversity jurisdiction. See 28 U.S.C.

11  
12 \_\_\_\_\_  
13 proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the  
14 state claims *may* be dismissed without prejudice and left for resolution to state tribunals." *Gibbs*,  
15 383 U.S. at 726-27 (emphasis supplied). See also *Matek v. Murat*, 862 F.2d 720, 732 (9th Cir.  
16 1988) ("Judicial economy and fairness to the litigants is better served by dismissal of the  
17 [predominating] pendent state claims"). "Finally, there may be reasons independent of  
18 jurisdictional considerations, such as the likelihood of jury confusion in treating divergent legal  
19 theories of relief, that would justify separating state and federal claims for trial. . . . If so,  
jurisdiction should ordinarily be refused." *Gibbs*, 383 U.S. at 727 (citing FED.R.CIV.PROC. 42(b)  
("For convenience, to avoid prejudice, or to expedite and economize, the court may order a  
separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party  
claims"))).

20 Defendants cannot argue persuasively that the wrongful foreclosure claims of nine  
21 individuals predominate over the myriad claims of the remaining plaintiffs, who number almost  
22 100. While it is true that the complaint alleges a "common plan and scheme designed to conceal  
23 . . . material facts" from plaintiffs (Complaint, ¶ 163), the nine individuals who assert wrongful  
foreclosure and breach of contract claims seek a form of relief that is unavailable to the remaining  
plaintiffs. The proof that will be required to prevail on their claims will be distinct and in large  
measure separate from the evidence that will be necessary to prove the remaining claims.

24 Defendants have not demonstrated that judicial economy and fairness would be served by  
25 requiring almost 100 plaintiffs who allege claims outside federal jurisdiction to litigate those  
26 claims in federal court. This is especially true since their claims can just as easily be adjudicated  
27 in state court with no prejudice to any party. Consequently, if the court were to reach the issue,  
it would decline to exercise supplemental jurisdiction over the claims of plaintiffs who do not  
assert a wrongful foreclosure or breach of contract claim.

28 <sup>135</sup>Complaint at 84 (emphasis added).


1 § 1332(a) (diversity jurisdiction exists only “where the amount in controversy *exceeds* the sum or  
2 value of \$75,000 exclusive of interest and costs. . .” (emphasis added)); Matheson, 319 F.3d at  
3 1090 (“[J]urisdiction founded on [diversity grounds] requires that the parties be in complete  
4 diversity and the amount in controversy *exceed* \$75,000” (emphasis added)). Second, the  
5 statement that “fewer than 100 plaintiffs” allege claims that possibly meet the jurisdictional  
6 threshold could mean that *no* plaintiffs allege claims that equal or exceed \$75,000; absent  
7 additional information, it is speculative to conclude that “fewer” means some number above zero.

8 For all of these reasons, result, defendants have failed to meet their burden of  
9 demonstrating by a preponderance of the evidence that the claims of each individual plaintiff meet  
10 the jurisdictional threshold for diversity jurisdiction.

### 11 12 III. CONCLUSION

13 For the reasons stated, the court grants plaintiffs’ motion, and directs the clerk to remand  
14 the action to Los Angeles Superior Court forthwith. The court denies defendants’ motion to  
15 dismiss as moot.

16  
17 DATED: January 11, 2012

  
MARGARET M. MORROW  
UNITED STATES DISTRICT JUDGE